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No. 99-973

In The

Supreme Court of the United States

JOHN BAKER,

Petitioner,

v.

ANITA JOHN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alaska Supreme Court correctly held that in 1993 the Assistant Secretary of the Interior for Indian Affairs, acting on behalf of the United States, lawfully recognized the Indian, Eskimo, and Aleut residents of 226 small communities in Alaska as "tribes" whose governing bodies possess sovereign authority to adjudicate child custody disputes involving Native children.

2. If it did not, whether the Alaska Supreme Court correctly held that in 1994 Congress – through its enactment of the Federally Recognized Indian Tribe List Act – ratified the Assistant Secretary's *ultra vires* recognition.

3. Whether the Alaska Supreme Court correctly held that Congress intended the phrase "divorce proceeding" in § 4(1) of the Indian Child Welfare Act to include a custody dispute between unmarried parents.

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PETITION FOR A WRIT OF CERTIORARI

John Baker petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Alaska in this case.

OPINIONS BELOW

The opinion of the Alaska Supreme Court is reported at 982 P.2d 738 and is reprinted in the appendix at App. 1. The Findings of Fact, Conclusions of Law, and Judgment of the Alaska Superior Court are not reported, but are reprinted in the appendix at App. 187.

JURISDICTION

The judgment of the Supreme Court of the State of Alaska was entered on September 8, 1999. App. 1. No petition for rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTES INVOLVED

Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, Title I, 108 Stat. 4791 (1994) (codified in part at 25 U.S.C. §§ 479a-479a-1).

The pertinent text of both statutes is reprinted at App. 201 and App. 208.

INTRODUCTION

This case presents a jurisdictional dispute of extraordinary importance to the continued ability of Alaska courts to protect the emotional well-being and physical safety of the 43,230 Native children who reside in Alaska, the majority of whom live in one of 226 small communities that are scattered across the expanse of the nation's largest state.[1]

In 1971 Congress designated those communities as "Native villages" when it settled Alaska Native land claims by conveying state-chartered corporations that Natives organized in each village and region of Alaska fee title to 44 million acres of land.[2]

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[1] Section 3(b), 43 U.S.C. § 1602(b), of the Alaska Native Claims Settlement Act (ANCSA) defines "Native" as "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian . . . Eskimo, or Aleut blood, or combination thereof." As used herein, "Native" also means a child who has a parent who is a "Native" as defined in § 3(b). In 1998 there were 43,230 Native children in Alaska who were less than eighteen years old. Alaska Department of Labor, *Alaska Population Overview: 1998 Estimates*, Table 1.8 (Alaska Native American Population Estimate by Age and Male/Female).

[2] ANCSA, 43 U.S.C. § 1601 *et seq.* (1971), extinguished aboriginal title in Alaska. As compensation for the extinguishment, ANCSA conveyed Alaska Natives legal title to 44 million acres of land and paid Alaska Natives $962.5 million. To be a "Native village" eligible for land and monetary benefits,

The Native village at which the jurisdictional dispute presented in this case arose is Northway, a small, population 113, road-connected community in the Alaska interior. The dispute involves the custody of two Athabascan Indian children, Emmanuel Baker and John Baker Jr., who at the time the dispute arose were three and four years old. On April 1, 1997 the Alaska Superior Court awarded custody of Emmanuel and John Jr. to petitioner John Baker, their biological father, and awarded respondent Anita John, their biological mother, visitation rights. App. 187. Like their children, Mr. Baker and Ms. John, who never married, are Athabascan Indians.

The court entered its judgment after conducting a hearing at which both parents were represented by counsel and testified, and at which the court considered a report a court-appointed custody investigator had prepared that documented Mr. Baker's and Ms. John's personal histories and relationships with their children. As Alaska Statute (A.S.) 25.20.060 required, the court decided on its judgment by "award[ing] custody on the basis of the best interest of the child." *See* App. 191-92.

In the Findings of Fact it entered with its judgment, the Alaska Superior Court found that Mr. Baker and Ms. John both had a history of alcohol abuse problems. The court found that in recent years Mr. Baker had made demonstrable progress in addressing his problem and

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§ 11(b)(3) of ANCSA, 43 U.S.C. § 1610(b)(3), required a community to be "not of a modern and urban character" and on the 1970 census enumeration date to have had at least 25 Native residents who collectively were a majority of the community's residents.

"[did] not drink when the children are present," but that Ms. John had "not successfully addressed her substance abuse problems and continues to drink." The court found and admonished that "Ms. John drinks every couple of weeks and always drinks until she blacks out. Ms. John drinks when the children are around . . . If Ms. John does not stop drinking alcohol, her mental and physical health is in serious danger!" App. 188-89. For that reason, the court awarded "full legal custody of the children to Mr. Baker" until "Ms. Johns (sic) is able to demonstrate her sobriety and stability," at which time the custody issue "can be addressed and reconsidered." App. 191.

On September 8, 1999 the Alaska Supreme Court, by a vote of 3 to 2, vacated the Superior Court's judgment on the ground that a "tribal court" that had been created in 1983 by the village council in Northway, the community in which Mr. Baker was raised and near which he and Emmanuel and John Jr. reside, on August 29, 1995 had issued a "judgment" that awarded Mr. Baker and Ms. John joint custody. In so holding, the Alaska Supreme Court announced that "[t]ribal courts in Alaska have jurisdiction to adjudicate custody disputes involving tribal members. This jurisdiction is concurrent with that of the state courts." The Alaska Supreme Court then directed the Superior Court to dismiss the custody petition Mr. Baker had filed in the Superior Court and recognize the Northway tribal court judgment as a matter of comity if the Superior Court determined that the tribal court proceeding had afforded Mr. Baker due process. App. 59.

From 1884 until the Alaska Supreme Court issued its decision in this case, Alaska courts have had exclusive

jurisdiction to enforce statutes that, first Congress, and then the Alaska Territorial and State Legislatures, have enacted to protect Native children from abuse and neglect. In deciding that Alaska Superior Courts henceforth must defer to tribal courts, which in recent years have been invented in Northway and other Native villages from political whole cloth, which as institutions may exist only on paper, and which are not required to enforce the "best interest of the child" standard or to afford Native parents the procedural protections the United States and Alaska Constitutions guarantee, the Alaska Supreme Court concluded that in 1994 Congress mandated the new child custody adjudication regime that the court's decision in this case imposes.

But Congress intended no such result.

To conclude that it did required the Alaska Supreme Court to ignore a fundamental principle of statutory construction that this Court repeatedly has instructed courts to apply to discern the intent of Congress embodied in federal statutes. And it required the Alaska Supreme Court to ignore the Assistant Secretary of the Interior for Indian Affairs' unlawful violation of the constitutional doctrine of separation of powers. But most importantly, unless reversed by this Court, the Alaska Supreme Court's decision in this case will have extremely adverse consequences for thousands of Native children who are similarly situated to Emmanuel and John Baker Jr. As Justice Matthews, the Chief Justice of the Alaska Supreme Court, in a 121-page dissenting opinion described the real-world consequences his court's misconstruction of the intent of Congress has in store for Native children:

> Today's opinion changes Alaska society. Alaska law no longer applies to every Alaskan. The doors of Alaska's courts will no longer be open to all Alaskans. More than one-sixth of Alaskan children, regardless of where they reside, will be subject to the laws of one of 226 village tribal organizations. More than one-sixth of Alaskan adults, regardless of where they reside, will be subject to the domestic relations laws of one of 226 village tribal orgarizations. These laws, written or unwritten, may be different from the laws of the state, indeed they may conflict with the laws of the state. But their reach will be statewide, and even beyond, governing cases that arise in cities, towns, and villages which may be hundreds of miles from the village whose tribal laws are applied. And the family law cases of more than one out of six Alaskan children and adults now will be subject to adjudication not in the Alaska Court System, but in the tribal courts of one of 226 villages. Some tribal court cases will be decided fairly. Others will not be. But the only remedy Alaskans aggrieved by the application of conflicting laws or unfair decisions will have is to pursue "comity" litigation in the state courts. Relief through this vague doctrine will be uncertain, hard to obtain, and expensive. (footnote omitted).

App. 63-64.

Before Justice Matthews' prediction is validated as prescient, this Court should grant the writ and address the jurisdictional questions presented.

STATEMENT OF THE CASE

1. The Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, grants Congress "plenary power over Indian affairs." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998).

For a hundred years Congress exercised that power to achieve an opprobrious objective: the clearing of the public domain of the Native Americans who occupied it.[3]

2. The United States purchased Alaska in 1867, but Congress did not turn serious attention to its new possession until 1880 when it considered legislation to grant Alaska a civil government. Since the coterminous states by then had been largely cleared of Native Americans, in 1880 the new objective of the members of Congress and Protestant clergy who were interested in Indian policy was to prepare Native Americans who had survived the clearing for citizenship. FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984). The Presbyterian missionary Sheldon Jackson was a member of that group and the principal lobbyist for Alaska civil government. Ted C. Hinckley, *Sheldon Jackson,*

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[3] The Senate pursued that objective by ratifying treaties in which Native Americans ceded land. In 1830, Congress authorized the President to relocate Native Americans who resided east of the Mississippi River to locations west of the river. 4 Stat. 411. West of the river, "[v]irtually every major war of the two decades after Appomattox was fought to force Indians on to newly created reservations or to make them go back to reservations from which they had fled." ROBERT M. UTLEY, THE INDIAN FRONTIER OF THE AMERICAN WEST, 1846-1890, at 164 (1984).

Presbyterian Lobbyist for the Great Land of Alaska, Journal of Presbyterian History (March 1962). In a colloquy with Senator Manning Butler during the first hearing on Alaska civil government, Jackson advised:

> Jackson: It is not necessary that the United States should feed or clothe them [i.e., the Tlingit and Haida Indians of southeast Alaska], or make treaties with them. This enables us in our Indian policy to take a new departure; and treat them as American citizens. All that is necessary to be done is to afford them government and teachers, which they cannot procure themselves.
>
> Butler: In other words, you mean to say that if we should afford the protection of a well-organized government, they would subordinate themselves to the law of the United States. That is your idea?
>
> Jackson: That is my idea.

S. Rep. No. 47-457, at 12 (1880).

In 1884 when it established a civil government in Alaska, Congress accepted Jackson's recommendation by subjecting all Alaska residents, both Native and non-Native, to "the general laws of the State of Oregon." Alaska Organic Act, § 7, 23 Stat. 24 (1884). In 1899 and 1900, Congress enacted Alaska criminal and civil codes to which Native and non-Native Alaska residents were subject. 30 Stat. 1253 (1899); 31 Stat. 321 (1900). In 1912, Congress authorized election of the Alaska Territorial

Legislature, Pub. L. No. 62-334, 37 Stat. 512 (1912), to which it granted authority to assert jurisdiction in Native villages. *See e.g.*, ch. 44, 1913 Alaska Sess. Laws 80 (statute making failure of Native parents to send their children to village grade schools a criminal offense). Summarizing that history, in 1932 Secretary of the Interior Ray Lyman Wilbur advised Congress that

> In the United States statutes Alaska has never been regarded as Indian country. The United States has had no treaty relations with any of the aborigines of Alaska nor have they been recognized as the independent tribes with a government of their own. The individual native has always and everywhere in Alaska been subject to the white man's law, both Federal and territorial, civil and criminal.

Letter from Ray Lyman Wilbur to the Hon. Edgar Howard (March 14, 1932), *reprinted in Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 before the Senate Comm. on Indian Affairs*, 72d Cong. 15-16 (1932). In 1958 the Assistant Secretary of the Interior who supervised the Bureau of Indian Affairs (BIA) reaffirmed to Congress that "the general understanding had been that the many native villages in Alaska were not Indian country, and it had been the general practice for Territorial officers to apply Territorial law in the native villages." Letter from Roger Ernst to the Hon. Emanuel Celler (Feb. 25, 1958), *reprinted in* S. Rep. No. 85-1872, at 3 (1958).[4]

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[4] In 1957 an Alaska District Court decided that Congress intended the Moquwackie Reserve, an executive order reserve that had been established at Tyonek, a small Indian village, to be

3. It is blackletter law that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states. . . . " *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). In 1958 when Congress enacted the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), § 1 of the Act ratified the Alaska Constitution. The ratification codified Congress's intent that all Alaska residents, both Native and non-Native, be subject at all locations in Alaska to the exclusive jurisdiction of Alaska courts to adjudicate domestic relations matters, including child custody disputes.

4. In 1971 Congress settled Alaska Native land claims by enacting ANCSA. Section 8 of ANCSA, 43 U.S.C. § 1607, reaffirmed Congress's policy that since 1912 had subjected Alaska Natives to the jurisdiction of the Alaska Territorial and State Legislatures and courts by requiring Alaska Natives to implement their settlement by organizing corporations in Native villages

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Indian country. *In re McCord*, 151 F.Supp. 132 (D. Alaska 1957). Congress responded to *McCord* by enacting Pub. L. No. 85-615, 72 Stat. 545 (1958), which amended Pub. L. No. 83-280, 67 Stat. 588 (1953), to grant the Alaska Territorial Legislature jurisdiction within Indian country. The anomalous circumstances that produced *McCord* and provoked the enactment of Pub. L. No. 85-615 are described in Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 Alaska Law Rev. 353, 382-85 (1997) (hereinafter "*Why History Counts*"). Congress's prompt grant to the Territorial Legislature of jurisdiction within the "Indian country" the *McCord* decision unexpectedly (and erroneously) created reaffirmed the decision Congress made in 1884 to subject Native residents of Native villages to the same criminal and civil jurisdiction to which non-Native residents of Alaska are subject.

"under the laws of the State [of Alaska]." Section 14 of ANCSA, 43 U.S.C. § 1613, required the Secretary of the Interior to convey village corporations title to the surface estate of land in fee simple. Section 19 of ANCSA, 43 U.S.C. § 1618, revoked the Moquwackie Reserve and all other land reserves that had been set aside "for Native use or for administration of Native affairs" (other than a reserve Congress set aside in 1891 for a group of Canadian Indians). And § 2 of ANCSA, 43 U.S.C. § 1601, directed that the ANCSA settlement "be accomplished . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] without creating a reservation system. . . . "

5. In 1974 Congress became concerned that state courts and welfare agencies were removing a disproportionately large number of Native American children from their parents' homes on reservations in the coterminous states. In 1978 Congress addressed the problem by enacting the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq. See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-36 (1989) (description of congressional concern that resulted in enactment of ICWA).

Section 102(a) of ICWA, 25 U.S.C. § 1911(a), granted Indian tribes exclusive jurisdiction "over any child custody proceeding involving an Indian child who resides or is domiciled within [a tribe's] reservation." With respect to state child custody proceedings involving Indian children who do not reside or are not domiciled within a reservation, other sections of ICWA preempted state law

to afford Indian children and parents new procedural and substantive protections in the state proceedings.[5]

To afford those protections to Native children and parents, § 4(3) and (8) of ICWA, 25 U.S.C. § 1903(3) and (8), defines the term "Indian" to include Alaska Natives, and defines the term "Indian tribe" to include communities in Alaska that are "Native villages" for the purposes of ANCSA.

Congress also included a special provision in ICWA, § 108, 25 U.S.C. § 1918, pursuant to which Native residents of Native villages in Alaska and Native American residents of other ICWA "tribes" who do not reside on reservations and who Congress has subjected to state jurisdiction to "reassume jurisdiction over child custody proceedings" by submitting a petition to the Secretary of the Interior that "includes a suitable plan to exercise such jurisdiction."[6]

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[5] *E.g.*, A.S. 25.23.070 allows a parent to withdraw his or her consent to an adoption more than ten days after the consent was executed only if a court determines that the withdrawal will be in the best interest of the child. With respect to a consent executed by the parent of a Native child who is an "Indian child" for the purposes of ICWA, § 103 of ICWA, 25 U.S.C. § 1913, allows the parent to withdraw his or her consent "for any reason at any time prior to the entry of a final decree of . . . adoption."

[6] When it reported the bill Congress enacted as ICWA, the House Committee on Interior and Insular Affairs explained that it had added § 108 to the bill "as an amendment in order to take into consideration special circumstances, such as those occurring in Alaska. . . . " H.R. Rep. No. 95-1386, at 25 (1978).

6. In the 1980s a political movement, known as the "Native sovereignty movement," began within the Native community in Alaska whose organizing tenets are 1) that the Native residents of 226 Native villages are "federally recognized tribes" whose governing bodies possess sovereign authority and immunity,[7] and 2) that land within and surrounding Native villages is Indian country. *See Why History Counts* at 391-94 (description of birth of Native sovereignty movement).

In *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), this Court held that fee title land within and surrounding Native villages is not Indian country. This Court has not decided whether Native residents of Native villages are "federally recognized tribes." But after reviewing the history of Congress's Alaska Native policy, in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d at 41, the Alaska Supreme Court concluded that

> In a series of enactments following the [1867] Treaty of Cession and extending into the first

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[7] Since the birth of the Native sovereignty movement, Native village councils repeatedly have invoked "sovereign immunity" to try and circumvent the jurisdiction of Alaska courts in order to avoid liability for breaches of contracts into which they voluntarily had entered. *See Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983); *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988); *Hydaburg Co-op. Ass'n v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992); *Nenana Fuel v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992). Those efforts were not successful. However, if the Alaska Supreme Court is correct in this case that the governing bodies of Native villages now have sovereign authority, they and their business entities now also have sovereign immunity.

> third of this century, Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status. The historical accuracy of this conclusion was expressly recognized in the proviso to the [1936] Alaska Indian Reorganization Act . . . No [congressional] enactment subsequent to the Alaska Indian Reorganization Act granted or recognized tribal sovereign authority in Alaska.

With respect to custody proceedings involving Native children, in *Native Village of Nenana v. State, Dept. of Health and Social Services*, 722 P.2d 219 (Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986), the Alaska Supreme Court acknowledged that Native residents of Native villages are "tribes" for the purposes of ICWA. But because Congress at statehood granted Alaska courts exclusive jurisdiction over all child custody proceedings, the court correctly held that a Native ICWA tribe has no jurisdiction over proceedings involving Native children unless, pursuant to § 108 of ICWA, it petitions the Secretary of the Interior for jurisdiction and the Secretary grants the petition. Expressing the same concern Chief Justice Matthews expressed in his dissent in this case, in *Nenana* the court noted that

> There are more than 200 [Native] villages "listed" in §§ 1610 and 1615 [of ANCSA] alone. Some of these entities already may have systems for dispute resolution in place capable of adjudicating custody matters in a reasonable and competent fashion; others, no doubt, do not. It seems highly unlikely that Congress was unaware of this when it enacted the Indian Child Welfare Act, or that it intended the Indian tribes in Alaska to exercise jurisdiction in child

> custody matters until such time as there is satisfactory proof that a particular tribe has the ability to properly adjudicate such cases. (citation and footnote omitted).

722 P.2d at 222.

7. After the birth in 1991 of John Baker Jr. when respondent Anita John was sixteen years old, petitioner Baker and Ms. John lived with their children in Mentasta, a small community 90 road miles southwest of Northway in which Ms. John was raised. In 1993 the couple separated and Mr. Baker moved to Northway. For the next two years he and Ms. John informally shared custody of the children. App. 3.

As an outgrowth of the Native sovereignty movement, in 1983 the Northway village council, which has no *de jure* status but operates in the community as a matter of local tradition,[8] passed an "ordinance" that "vested"

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[8] Northway was established around 1910 when several Athabascan Indian families built cabins near a trading post at the mouth of the Nabesna River in the Upper Yukon district. ALASKA NATIVE LANGUAGE CENTER, UNIVERSITY OF ALASKA, WALTER NORTHWAY 44-45 (1987). By 1912 the residents of Old Nabesna, as Northway then was known, had organized a council. *Id.* 46. In 1913 the superintendent of the Bureau of Education (the BIA's predecessor agency) for the Upper Yukon district reported:

> There are . . . several village councils in this district . . . [which] are good in their way, but they have no official standing . . . A native will often abide by the decision of the council for the sake of his prestige with the rest of the tribe, but, unless he has committed a serious offense which calls for action by the nearest United States Marshal, his compliance

the "judicial authority of the Native Village of Northway" in the council. Section 5 of the ordinance granted the council authority to decide "custody, divorce, adoption, support, or other domestic relation matters." *See* App. 195 (Northway Native Village Council Ordinance No. 83-5).

In July 1995 when their relations regarding their children became estranged, Mr. Baker and Ms. John each asked the Northway village council for assistance. Acting on behalf of the council, in August Northway resident Lorraine Titus convened a meeting of the "Native Village of Northway Tribal Court" at the council's office in Northway in which Mr. Baker and Ms. John participated, after which the village council's clerk signed a "judgment" that "split custody" of Emmanuel and John Jr. The judgment also directed Mr. Baker and Ms. John to relocate their children once a month from Mr. Baker's home in Northway to Ms. John's home in Mentasta. *See* App. 199 (Native Village of Northway Tribal Court Judgment).

Pursuant to that arrangement, the children spent November at Ms. John's residence in Mentasta. In December, Mr. Baker learned that three year old Emmanuel had broken his leg while playing unsupervised in Ms. John's home and that Ms. John had not promptly sought medical treatment. He by then also had become concerned about Ms. John's episodic binge drinking. When he retrieved

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with any decision is more or less a voluntary matter on his part.

Letter from George E. Boulter to Commissioner of Education (Dec. 12, 1913). BIA. Alaska Division. General Correspondence. District Files 1908-35. Upper Yukon 1912-1922. National Archives Record Group 75.

the children from Ms. John, Mr. Baker informed Lorraine Titus about Ms. John's drinking problem. As Mr. Baker subsequently explained to the Alaska Superior Court: "[I asked the Northway tribal court] to intervene on this matter, which they would not. They says, 'You – you'll just have to wait your turn.' They says, 'Just collect the information.' " *Baker v. John*, Alaska Superior Court No. 4FA-95-3103 CI, Transcript of Proceedings, at 8-9 (March 27, 1997).

Petitioner Baker, who supports himself and his children working as a laborer and who presently is indigent, then traveled to Fairbanks, where he retained an attorney who on December 28, 1995 petitioned the Alaska Superior Court to grant Mr. Baker custody of Emmanuel and John Jr. on the ground that it was "impossible to share legal custody as the defendant suffers from an alcohol dependency making joint decision (sic) untenable." *Baker v. John*, Alaska Superior Court No. 4FA-95-3103 CI, Complaint and Petition Child Custody (Dec. 27, 1995).

After appointing a custody investigator to investigate the family situation and then conducting a hearing at which Mr. Baker and Ms. John were represented by counsel and both testified, on April 1, 1997 the Alaska Superior Court entered a judgment that awarded custody of Emmanuel and John Baker Jr. to petitioner Baker. App. 187.

8. On September 8, 1999, the Alaska Supreme Court issued its opinion in this case, vacating the Superior Court's judgment on the ground that the Northway tribal court had jurisdiction over the custody dispute between Mr. Baker and Ms. John to which the Superior Court must

defer if it concludes that the tribal court's "judgment" should be recognized as a matter of comity. App. 59.

The Northway village council has not petitioned the Secretary of the Interior, pursuant to § 108 of ICWA, to "reassume" jurisdiction over "child custody proceedings." However, when it concluded that Lorraine Titus and the Northway village council had jurisdiction while meeting as the Native Village of Northway Tribal Court to adjudicate the custody dispute in this case, the Alaska Supreme Court announced that § 108 and its prior holding in *Native Village of Nenana, supra,* were not applicable because the custody dispute between petitioner Baker and respondent John was not a "child custody proceeding" as § 4(1) of ICWA, 25 U.S.C. § 1903(1), defines the term. The court reasoned to that result, first by noting that § 4(1) exempts a "divorce proceeding" that results in a custody award to a parent from the "child custody proceeding" definition. The court then baldly declared that Congress intended the phrase "divorce proceeding" to include "a custody battle between *unmarried* parents" (emphasis added). App. 11-14. That misconstruction of the text of § 4(1) freed the Northway village council from the nondiscretionary § 108 requirement that it petition the Secretary of the Interior for jurisdiction to adjudicate child custody disputes.

The Alaska Supreme Court next concluded that its 1988 holding in *Native Village of Stevens, supra,* was obsolete because in 1994 Congress abandoned the Native policy it had implemented in Alaska since 1884. According to the court, in 1994 Congress did so by transforming the Native residents of Northway and 225 other Native villages into "federally recognized tribes" whose governing

bodies possess "inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members."

The Alaska Supreme Court based that holding on its assessment of the legal import of two facts. *See* App. 18-23. The first fact is that in 1993 the Assistant Secretary of the Interior for Indian Affairs published a list of "Native Entities Within the State of Alaska Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs." 58 Fed. Reg. 54368 (1993). In the preamble published with the list the Assistant Secretary announced that publication of the list constituted the Department of the Interior's acknowledgement that Native residents of Native villages "have the same status as tribes in the contiguous 48 states." *Id.* 54365-66.

The second fact is that in 1994 Congress enacted the Federally Recognized Indian Tribe List Act (FRITLA), Pub. L. No. 103-454, Title I, 108 Stat. 4791 (1994) (codified in part at 25 U.S.C. §§ 479a-479a-1). Section 104 of FRITLA, 25 U.S.C. § 479a-1, directs the Secretary of the Interior to annually publish a list of "all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The Alaska Supreme Court reasoned that the delegation of authority in § 104 "appears to lay . . . doubts [about the power of the Department of the Interior to recognize sovereign political bodies] to rest." App. 21. The Alaska Supreme Court then concluded that "[t]hrough the [Assistant Secretary's publication of her] 1993 tribal list and the 1994 Tribe List Act, the federal government has recognized the

historical tribal status of Alaska Native villages like Northway." App. 22.

Since this Court has held that the governing body of a "federally recognized tribe" possesses "inherent power" to "regulate domestic relations among members," *see Montana v. United States*, 450 U.S. 544, 564 (1981), the Alaska Supreme Court held that the governing bodies of Northway and the 225 other new "federally recognized tribes" in Alaska possess sovereign authority to adjudicate child custody disputes between unmarried (and by inference also married) Native parents such as petitioner Baker and respondent John.

REASONS FOR GRANTING THE WRIT

I. THE JURISDICTIONAL QUESTIONS PRESENTED ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

The importance of this case cannot be overstated. Today in Native villages alcohol and substance abuse, and family violence and dysfunction, daily threaten the emotional well-being and physical safety of thousands of Native children.[9]

[9] *See e.g., Report of the Alaska Federation of Natives on the Status of Alaska Natives: A Call for Action: Hearing before the Senate Select Comm. on Indian Affairs*, 101st Cong. 42, 44 (1989) (statement of Margaret Roberts, vice chairman of the Alaska Native Health Board, that "[t]he high suicide rate, along with the abnormally high rates of fetal alcohol syndrome, homicides, injuries, family violence, sexual abuse, teen pregnancies, and sexually transmitted diseases, are dramatic evidence of the

In *Kiowa Tribe of Okla. v. Manufacturing Tech., Inc.*, 523 U.S. 751, 758 (1998), this Court recently noted that the Indian Commerce Clause empowers Congress, if it wishes to do so, to allow the application of nineteenth century Indian law doctrines to produce results that, on the cusp of the twenty-first century, are unfair and unjust. Similarly, if Congress decides to create 226 new "federally recognized tribes" in Alaska whose governing bodies are empowered to supersede the jurisdiction of Alaska courts and adjudicate child custody disputes, the Indian Commerce Clause empowers Congress to make that decision no matter how damaging the result may be for Emmanuel and John Baker Jr. and other Native children.

But the diminution in this case of the child custody jurisdiction of Alaska courts is so unprecedented, and the life-altering consequences for Native children potentially is so profoundly adverse, that this Court should review the Alaska Supreme Court's holding that Congress intended to subject Native children to a child custody adjudication regime that prior to the Alaska Supreme Court's decision in this case had no *de jure* existence, and which today is untested, unfunded, and unprecedented.

This Court has recognized that judicial decisions that may diminish the ability of a state to subject its Native American citizens to the same jurisdiction to which its non-Native American citizens are subject raise federal questions of paramount importance that merit review. *See e.g., Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373 (1976)

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dramatic cultural dislocation currently being experienced by Alaska's Native people" and "[a]lcoholism is tearing apart our villages").

(petition for certiorari granted to determine jurisdiction of Minnesota to levy personal property tax); *Rice v. Rehner*, 463 U.S. 713 (1983) (petition for certiorari granted to determine jurisdiction of California to regulate alcohol sales); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) (petition for certiorari granted to determine jurisdiction of Montana to tax oil and gas production); *Alaska v. Native Village of Venetie Tribal Gov't, supra* (petition for certiorari granted to determine jurisdiction of Alaska on fee title land within and surrounding Native villages). The jurisdictional conflict the Alaska Supreme Court created by its decision in this case raises similar federal questions of paramount importance.

II. THE DECISION OF THE ALASKA SUPREME COURT THAT THE ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS' PUBLICATION OF A LIST OF "NATIVE ENTITIES WITHIN THE STATE OF ALASKA RECOGNIZED AND ELIGIBLE TO RECEIVE SERVICES FROM THE UNITED STATES BUREAU OF INDIAN AFFAIRS" CONSTITUTED RECOGNITION BY THE FEDERAL GOVERNMENT THAT NATIVE RESIDENTS OF 226 NATIVE VILLAGES IN ALASKA ARE "FEDERALLY RECOGNIZED TRIBES" DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT VIOLATES THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS AND CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

As the facts in this case demonstrate, the decision of the federal government to "recognize" a group of Native Americans as a "tribe" whose governing body possesses

"sovereign authority" has significant policy consequences. As the House Committee on Natural Resources has described the import of such a decision: "[F]ederal recognition is no minor step. A formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe . . . it institutionalizes the tribe's quasi-sovereign status, along with all powers accompanying that status. . . . " H.R. Rep. No. 103-781, at 2-3 (1994).

Because the consequences are significant, the Indian Commerce Clause grants Congress the *exclusive* power to confer recognition. Congress may delegate that power to an executive branch agency. But as the doctrine of separation of powers requires, an executive branch agency "has no power to act . . . unless and until Congress confers power upon it," *Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355, 374 (1986).[10]

Contrary to the opinion of the Alaska Supreme Court, in this case the Assistant Secretary of the Interior for Indian Affairs unlawfully violated that fundamental constitutional tenet.

In 1978 the Assistant Secretary promulgated regulations – *see* 43 Fed. Reg. 39361 (1978) (presently codified at 25 C.F.R. § 83.1 *et seq.* (1999)) – that granted him authority to recognize groups of Native Americans who petition him to do so as "tribes." The Assistant Secretary did so

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[10] *Accord, Alaska v. Native Village of Venetie Tribal Gov't, supra* at 531 n. 6 (holding that "because Congress has plenary power over Indian affairs . . . some *explicit* action by Congress (or the Executive, acting under *delegated* authority) must be taken to create or to recognize Indian country") (emphasis added).

even though two weeks earlier he had informed Congress that "no specific legislative authority" delegated him that authority. *See Recognition of Certain Indian Tribes: Hearing on S. 2375 before the Senate Select Comm. on Indian Affairs,* 95th Cong. 15 (1978).

In addition to authorizing Native American groups to petition for recognition, the regulations directed the Assistant Secretary to publish a list "of all Indian tribes which are recognized *and* receiving services from the Bureau of Indian Affairs" (emphasis added). 25 C.F.R. § 54.6(b) (1978). Although they long had received services from the BIA, Alaska Natives had never been "recognized" as "tribes". Nor had any Native group petitioned the Assistant Secretary for recognition. For those reasons, the lists of "tribes" the Assistant Secretary periodically published did not include Native villages.

In 1982 when he published a list of Alaska Native "entities" to which the BIA "[gave] priority for purposes of funding and services," the Assistant Secretary carefully explained that "unique circumstances" had made Alaska Native entities that were not "historical tribes" eligible for BIA services. 47 Fed. Reg. 53133 (1982). And in 1988 the Assistant Secretary explained that his republication of a list of Native entities eligible for BIA services did "not constitute a determination that [a Native] entity either would or would not qualify for Federal Acknowledgement under the regulations [that authorized Native American groups to petition for recognition]." 53 Fed. Reg. 52832 (1988).

In 1993 the new administration appointed a new Assistant Secretary who strongly personally believed that

Native residents of Native villages should be deemed "federally recognized tribes." *See Why History Counts* at 408-09 (description of policy views of the new Assistant Secretary). Three months after she was confirmed, the new Assistant Secretary published a new list of Native entities. The preamble published with the new list announced the Assistant Secretary's view that the list's publication constituted the Department of the Interior's determination that Native villages on the list have "the same governmental status as other federally acknowledged Indian tribes." 58 Fed. Reg. 54366 (1993).

In its decision in this case, the Alaska Supreme Court blithely accepted the Assistant Secretary's explanation that she had published her new list "in order to *clarify confusion* over the tribal status of various Alaska Native entities" by "*reaffirm[ing]* the sovereign status of the recognized tribes" (emphasis added). App. 19. The court then held that "[t]hrough the 1993 tribal list . . . , the federal government has recognized the historical tribal status of Alaska Native villages like Northway." App. 22.

Reasoning to that conclusion required the Alaska Supreme Court to ignore the uncontroverted facts that prior to 1993 no federal statute had "recognized" Native residents of Native villages as "tribes" (other than for certain specific purposes such as participation in ICWA), nor had the Native residents of Northway or any other Native village petitioned the Assistant Secretary for recognition as her regulations required (assuming *arguendo* that Congress had delegated the Assistant Secretary authority to promulgate the regulations).

This Court has warned executive branch officials against "the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300, 318 (1965). The Assistant Secretary violated that admonition when – to advance her personal policy views – she by fiat unilaterally "recognized" 226 "tribes" in Alaska. Her recognition was *ultra vires*. And the Alaska Supreme Court's conclusion of law in this case regarding the legal import of the Assistant Secretary's publication of the preamble that preceded her 1993 list was patently wrong.

III. THE DECISION OF THE ALASKA SUPREME COURT THAT CONGRESS INTENDED THE "DIVORCE PROCEEDING" EXEMPTION IN THE ICWA "CHILD CUSTODY PROCEEDING" DEFINITION TO EXEMPT ICWA "TRIBES" FROM PETITIONING THE SECRETARY OF THE INTERIOR FOR JURISDICTION TO ADJUDICATE CHILD CUSTODY DISPUTES BETWEEN UNMARRIED PARENTS AND THE DECISION OF THE ALASKA SUPREME COURT THAT CONGRESS INTENDED THE FEDERALLY RECOGNIZED INDIAN TRIBE LIST ACT TO RATIFY THE ASSISTANT SECRETARY OF THE INTERIOR FOR INDIAN AFFAIRS' "RECOGNITION" OF 226 TRIBES IN ALASKA DECIDED IMPORTANT FEDERAL QUESTIONS IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

This Court "time and again" has given clear direction regarding the methodology to utilize to discern the intent of Congress embodied in a statute. The Court's first canon of statutory construction is the central element of

that methodology. In *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), the Court described the first canon as follows: "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete' " (citations omitted). Because if the intent of Congress expressed in the text of a statute is clear, "that is the end of the matter," *Chevron U.S.A. v. N.R.D.C.*, 467 U.S. 837, 842 (1984), no matter what an executive branch official or court may think of the policy choice the text codifies.

In this case, to reach a policy choice it favored – *see* App. 46-48 (discussion by the court of its policy views), the Alaska Supreme Court twice ignored the first canon.

A. ICWA "Child Custody Proceeding" Definition.

Section 108 of ICWA, 25 U.S.C. § 1918, requires the Northway village council to petition the Secretary of the Interior to obtain jurisdiction over "child custody proceedings." Section 4(1) of ICWA, 25 U.S.C. § 1903(1), exempts a child placement made "upon an award, in a *divorce proceeding*, of custody to one of the parents" (emphasis added) from the "child custody proceeding" definition.

In this case, the Alaska Supreme Court concluded that the Northway village council was not required to petition the Secretary of the Interior for jurisdiction to adjudicate the custody dispute between petitioner Baker and respondent John because their custody dispute was a

"divorce proceeding" and therefore was not a § 4(1) "child custody proceeding," even though the court was aware that Mr. Baker and Ms. John had never married. *See* App. 11-14. To reach that inveracious result, the Alaska Supreme Court ignored the first canon of statutory construction and instead relied on a result-oriented reading of the legislative history of ICWA, as well as "guidelines" for implementing ICWA the BIA has published, even though the court was aware that, as the BIA carefully explained when it published them – *see* 44 Fed. Reg. 67584-85 (1979), the guidelines summarize the BIA's policy views, and not the agency's interpretation of the intent of Congress embodied in the text of the statute.

B. Federally Recognized Indian Tribe List Act.

After freeing the Northway village council from the necessity to comply with § 108 of ICWA by petitioning the Secretary of the Interior for jurisdiction to adjudicate the custody dispute between petitioner Baker and respondent John, the Alaska Supreme Court announced that "[t]he text and legislative history of the [Federally Recognized Indian] Tribe List Act demonstrate that [like the Assistant Secretary of the Interior for Indian Affairs who in 1993 'recognized' Northway and 225 other Native 'tribes' by publishing her list] Congress also views the recognized tribes as sovereign bodies." App. 21.

The hallmark of Congress's Native policy is the decision it made in 1884, and to which it consistently has adhered, to not "recognize" Native residents of Native villages as "sovereign bodies." For that reason, to hold

that Congress intended FRITLA to by implication repudiate that policy required the Alaska Supreme Court to ignore this Court's recent observation in *Jones v. United States*, 119 S.Ct. 1215, 1220 (1999) that "Congress is unlikely to intend any radical departures from past practice without making a point of saying so."

It also required the Alaska Supreme Court to again ignore the first canon of statutory construction. *See* App. 21-22. Had it applied the canon, the court would have discovered that the texts of §§ 102 and 104 of FRITLA, 25 U.S.C. §§ 479a-479a-1, authorize the Secretary of the Interior to annually publish *a* list of "Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians" (rather than *the* list the Assistant Secretary published in 1993). The texts also indicate that Congress did not intend §§ 102 and 104 to delegate the Secretary of the Interior authority to identify Native residents of Native villages as "tribes" for any purpose other than eligibility for programs and services.[11] Nor do the texts of §§ 102 and 104 approve,

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[11] Congress long has deemed Native residents of Native villages as "tribes" for the narrow purpose of eligibility for programs and services. *See e.g.*, 25 U.S.C. § 450b(e) (Native villages and ANCSA corporations "tribes" for purpose of Indian Self-Determination Act); 25 U.S.C. § 1603(d) (Native villages and ANCSA corporations "tribes" for purpose of Indian Health Care Improvement Act). Had its review of the legislative history of FRITLA been less result-oriented, the Alaska Supreme Court would have discovered that the House Committee on Natural Resources, which drafted the statutory text, carefully explained that

ratify, or express Congress's view regarding the validity of the Assistant Secretary's assertion in the preamble to the 1993 list that her publication of the list in and of itself created 226 "tribes" on Alaska that "have the same status as tribes in the contiguous 48 states."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOHN FRANICH
DONALD CRAIG MITCHELL*
Counsel for Petitioner

* *Counsel of Record*

It is the intent of the Committee that its previous position taken in the 1987 amendments to [ANCSA] be maintained and that nothing in [FRITLA] shall "confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands . . . or persons in Alaska." Pub. L. 100-241, § 2(8)(B). [FRITLA] *merely requires that the Secretary continue the current policy* of including Alaska Native entities on the list of Federally recognized Indian tribes which are *eligible to receive services.*

H.R. Rep. No. 103-781, at 5 (1994) (emphasis added).

THE SUPREME COURT OF THE STATE OF ALASKA

ANITA JOHN, Appellant, v. JOHN BAKER, Appellee.	Supreme Court No. S-8099 Superior Court No. 4FA-95-03103 CI OPINION [No. 5174 – September 8, 1999]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Ralph R. Beistline, Judge.

Appearances: Andrew Harrington and Mark Regan, Alaska Legal Services Corporation, Fairbanks, for Appellant. J. John Franich, Assistant Public Advocate, Fairbanks, Brant McGee, Public Advocate, Anchorage, and Deborah Niedermeyer, Fairbanks, for Appellee. Harold N. Brown and Michael J. Walleri, Tanana Chiefs Conference, Inc., Fairbanks, for Amicus Curiae Native Village of Northway. Heather R. Kendall-Miller and Martha L. King, Native American Rights Fund, Lloyd Benton Miller, Anchorage, and Vance A. Sanders, Juneau, for Amici Curiae Native Village of Venetie Tribal Government and Alaska Inter-Tribal Council. Vance A. Sanders, Law Office of Vance A. Sanders, LLC, Juneau, for Amici Curiae Paskenta Band of Nomlaki Indians, Scotts Valley Band of Pomo Indians, and Death Valley Timbisha Shoshone Tribe. D. Rebecca Snow, Assistant Attorney General, Fairbanks, and Bruce M. Botelho, Attorney General, Juneau, for Amicus Curiae State of Alaska. Lois J. Schiffer, Assistant Attorney General, David C. Shilton and Ethan G. Shenkman, Attorneys,

Department of Justice, Washington, D.C., John D. Leshy, Solicitor and Sandra J. Ashton, Office of the Solicitor, Department of the Interior, Washington, D.C., for Amicus Curiae United States.

Before: Matthews, Chief Justice, Compton, Eastaugh, Fabe, and Bryner, Justices.

FABE, Justice.

MATTHEWS, Chief Justice, with whom COMPTON, Justice, joins, dissenting.

I. INTRODUCTION

Seeking sole custody of his two children, John Baker, a member of Northway Village, filed a custody petition in the Northway Tribal Court. Anita John, the children's mother and a member of Mentasta Village, consented to Northway's jurisdiction. After the tribal court issued an order granting shared custody, Mr. Baker filed an identical suit in state superior court. Although Ms. John moved to dismiss based on the tribal court proceeding, the superior court denied the motion and awarded primary physical custody to Mr. Baker. Ms. John appeals, arguing that as a federally recognized tribe, Northway Village has the inherent sovereignty to adjudicate custody disputes between its members and that the superior court therefore should have dismissed the state case.

This appeal raises a question of first impression. We must decide whether the sovereign adjudicatory authority of Native tribes exists outside the confines of Indian country. After reviewing evidence of the intent of the Executive Branch, as well as relevant federal statutes and

case law, we conclude that Native tribes do possess the inherent sovereign power to adjudicate child custody disputes between tribal members in their own courts. We therefore reverse and remand to the superior court to determine whether the tribal court's custody determination should be recognized by the superior court under the doctrine of comity.

II. FACTS AND PROCEEDINGS

Anita John and John Baker are Alaska Natives; Ms. John is a member of Mentasta Village and Mr. Baker is a member of Northway Village. Although they never married, Ms. John and Mr. Baker had two children together: John Jr., born in July 1991, and Emmanuel, born in June 1992. The family lived together in Ms. John's village until the parents ended their relationship in 1993. For the next two years, Ms. John and Mr. Baker cooperated in sharing custody of John Jr. and Emmanuel. This cooperation ended in July 1995 when Mr. Baker refused to return the children to Ms. John.

In July 1995 Mr. Baker filed a petition with the Northway Tribal Court requesting sole custody of John Jr. and Emmanuel. The tribal court sent a notice to the parties on August 10 informing them of their right to be present at the custody hearing, and both parents participated in the hearing held on August 29. At the conclusion of the hearing, Tribal Court Judge Lorraine Titus ordered the parents to share custody of the children on an alternating monthly schedule. Judge Titus stated, however, that this arrangement would be temporary and that she would

reconsider the custody question in one year, before the oldest child entered school.

The parents followed the tribal court's order from September to December, deviating from the alternating schedule only so that Ms. John could care for the children while Mr. Baker was serving a sentence for DWI. During these months Mr. Baker appealed to the tribal court to change its custody order, but the court denied his request. Dissatisfied with the tribal court's custody determination, Mr. Baker filed a separate action in state court in December. In the affidavit accompanying the state complaint, required at that time under the Uniform Child Custody Jurisdiction Act (UCCJA),[1] Mr. Baker misled the superior court by stating that he was "unaware of any custody proceeding regarding the children, except as provided herein, in Alaska, or any other jurisdiction."

Citing the tribal court proceedings, Ms. John filed a motion to dismiss the state court action. The superior court denied her motion. Ruling first that the Indian Child Welfare Act (ICWA)[2] did not apply to a custody dispute between parents, the court concluded that it had subject matter jurisdiction over the suit. The court then stated that even if the tribal court had concurrent jurisdiction, "the facts of this case [would] require" superior court involvement. The court pointed to the state's access to a child custody investigator and to the parents' different tribal affiliations as facts justifying its involvement in the case.

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[1] Former AS 25.30.010 *et seq.*

[2] 25 U.S.C. § 1901 *et seq.*

The superior court's initial temporary custody order was identical to the tribal court's. The parties therefore continued with the alternating monthly custody schedule until April 1996, when the superior court altered its temporary order to give Mr. Baker primary custody. The superior court's final order, entered after trial, maintained Mr. Baker as primary physical custodian and granted Ms. John visitation every other weekend during the school year and for at least eight weeks during the summer. Although it recognized that both parents had experienced problems with substance abuse in the past, the superior court found that Mr. Baker was in better control of his problems than Ms. John. In addition, the court stated that Ms. John needed to address other issues, such as her severe depression. Ms. John appealed to this court, arguing that the superior court should have granted her motion to dismiss.

Shortly after we initially held oral argument in this appeal, the United States Supreme Court decided *Alaska v. Native Village of Venetie Tribal Government (Venetie II)*.[3] We then requested supplemental briefing, asking the parties to address how the *Venetie II* decision affects the issues presented.

III. DISCUSSION

Resolving this appeal requires us to examine the nature and scope of Native American self-government in Alaska. We must decide whether Northway Village had the jurisdiction to adjudicate a custody dispute involving

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[3] 118 S. Ct. 948 (1998).

children who are tribal members. If Northway possessed such jurisdiction, we must then decide whether the superior court should have dismissed Mr. Baker's identical state suit.

In a line of decisions beginning with *Native Village of Nenana v. State, Department of Health & Social Services*,[4] and ending in *In re F.P.*,[5] we held that Native villages in Alaska do not have the power to adjudicate some types of child custody disputes. Recognizing the existence of these precedents, Ms. John presents two alternative arguments for finding tribal jurisdiction in this case. First, she argues that we can rule in her favor without overruling *Nenana* and *F.P.* because those decisions do not apply to the facts of this appeal. Second, she contends that even if *Nenana* and *F.P.* do apply, we should reconsider their holdings. Ms. John claims that, regardless of whether they occupy Indian country, Alaska Native villages can adjudicate child custody disputes between members because of their status as federally recognized tribes.

Mr. Baker's briefing focuses on perceived flaws in the tribal court's decision in this case. He therefore claims that even if Northway Village generally has jurisdiction to decide child custody disputes between members, state courts should not recognize this particular decision because the proceedings violated due process and because his children are not members of Northway Village. We evaluate each of the parties' arguments after discussing the relevant standard of review.

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[4] 722 P.2d 219 (Alaska 1986).

[5] 843 P.2d 1214 (Alaska 1992).

A. Standard of Review

We rely on our independent judgment to decide legal questions such as the scope of tribal court subject matter jurisdiction and the meaning of federal statutes.[6] In exercising our independent judgment, we will adopt the rule of law that is most persuasive in light of precedent, reason, and policy.[7]

B. Our Prior Decisions on Tribal Court Jurisdiction to Decide Custody Disputes Do Not Apply to This Case.

Mr. Baker claims that the holdings in *Nenana* and *F.P.* compel the conclusion that Northway is without jurisdiction in this case. Although not conceding that these decisions apply to the facts before us, Ms. John asks us to reconsider the holdings of those decisions. All the amici, including the United States and the State of Alaska, join Ms. John in urging us to reconsider these decisions and recognize tribal court jurisdiction. Before we decide whether to re-examine our precedents, we must determine whether they apply to the facts before us. Accordingly, we begin our analysis with an examination of whether it is necessary that we revisit *Nenana* and *F.P.* in order to decide this case.

Although the holdings in *Nenana* and *F.P.* touched upon the contours of tribal court jurisdiction, both of

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[6] *See Hydaburg Coop. Ass'n v. Hydaburg Fisheries*, 925 P.2d 246, 248 (Alaska 1996); *In re T.N.F.*, 781 P.2d 973, 975 (Alaska 1989).

[7] *See Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

those decisions were rooted in a pair of federal laws that may not apply to the facts of the dispute between Ms. John and Mr. Baker: Public Law 280[8] (P.L. 280) and the Indian Child Welfare Act (ICWA).[9] If this case does not fall within the scope of either of those pieces of legislation, then the holdings in our prior decisions are not squarely before us today, and it may be unnecessary to reconsider them.

1. The holdings of *Nenana* and *F.P.*

Nenana and *F.P.* dealt with the question of tribal court jurisdiction in cases falling under ICWA in Alaska. In *Nenana*, the village petitioned a superior court under ICWA to transfer a child-in-need-of-aid proceeding to the village's jurisdiction.[10] Interpreting ICWA, the superior court ruled that transfer was improper because the village had not petitioned the Secretary of the Interior to reassume jurisdiction over child custody proceedings.[11]

In evaluating the arguments on appeal in *Nenana*, we first considered § 1918(a) of ICWA,[12] which states that any Indian tribe that became subject to state jurisdiction under P.L. 280 may "reassume" jurisdiction over child custody proceedings by petitioning the Secretary of the

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[8] Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

[9] 25 U.S.C. § 1901 *et seq.*

[10] *See* 722 P.2d at 220.

[11] *See id.* at 221.

[12] *See id.*

Interior.[13] Public Law 280 is a federal statute that grants several states, including Alaska, jurisdiction over all civil and criminal matters arising in Indian country.[14] In *Nenana*, we interpreted § 1918(a)'s reassumption requirement to mean that P.L. 280 had vested exclusive jurisdiction over child custody matters in state courts, and that the state exercised exclusive jurisdiction until a particular tribe successfully petitioned the Secretary of the Interior.[15] Because the village of Nenana had not petitioned the Secretary of the Interior for reassumption, we affirmed the superior court's denial of the petition for transfer.[16]

In *F.P.*, we were asked to reconsider *Nenana*'s holding in light of the Ninth Circuit's decision in *Native Village of Venetie I.R.A. Council v. Alaska (Venetie I)*.[17] The question before the Ninth Circuit in *Venetie I* was whether ICWA required the State of Alaska to recognize tribal court child custody determinations.[18] The state argued that because P.L. 280 had granted state courts exclusive jurisdiction over all civil disputes, the villages could not exercise any child custody jurisdiction without first petitioning the

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[13] 25 U.S.C. § 1918(a).

[14] *See* 28 U.S.C. § 1360(a). Enacted in 1953, P.L. 280 required five states to assume civil and criminal jurisdiction over affairs in Indian country, and allowed other states to assume such jurisdiction voluntarily. In 1958, Alaska was added to the list of mandatory P.L. 280 jurisdictions. *See* Act of Aug. 8, 1958, P.L. No. 85-615, § 2, 72 Stat. 545.

[15] *See Nenana*, 722 P.2d at 221.

[16] *See id.*

[17] 944 F.2d 548 (9th Cir. 1991).

[18] *See id.* at 550.

Secretary of the Interior.[19] The Ninth Circuit resolved the dispute by addressing two issues: first, "whether the native villages are inherently sovereign, at least insofar as domestic relations or child-custody issues are concerned," and second, "whether Congress has stripped the villages of that aspect of sovereign authority which encompasses child-custody determinations."[20] Although suggesting that it saw no impediment to a finding of sovereignty, the court concluded that sovereign status depended on a factual analysis that should be conducted by the district court.[21] It then held that P.L. 280 had not stripped the villages of sovereignty over child custody issues because it had granted the states only concurrent jurisdiction.[22]

In *F.P.*, we disagreed with the Ninth Circuit's conclusions on both the issue of sovereignty and on the meaning of P.L. 280. Addressing the sovereignty question first, we stated that the Ninth Circuit's "opinion is contrary to *Native Village of Stevens v. Alaska Management & Planning*,[23] where we concluded that 'the history of the relationship between the federal government and Alaska Natives indicates that Congress intended that most Alaska Native groups not be treated as sovereigns.' "[24] Moving to the second step in the *Venetie I* analysis, we

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[19] *See id.* at 556, 558.

[20] *Id.* at 556.

[21] *See id.* at 559.

[22] *See id.* at 562.

[23] 757 P.2d 32 (Alaska 1988).

[24] *In re F.P.*, 843 P.2d 1214, 1215 (Alaska 1992) (internal ellipsis and citation omitted).

reiterated our view that P.L. 280 had granted the states exclusive jurisdiction over child custody matters, quoting from the portion of *Nenana* that interpreted ICWA's § 1918(a).[25] We therefore reaffirmed our prior holding that tribal courts lack jurisdiction over child custody proceedings under ICWA until they successfully reassume jurisdiction by filing a petition with the Secretary of the Interior.[26]

In sum, our decisions to limit tribal adjudicatory power in *Nenana* and *F.P.* turned on our interpretation and application of ICWA and P.L. 280. In order to determine if those decisions are controlling, then, we must examine whether those two federal laws similarly apply to the case presently before us.

2. ICWA does not apply to the dispute between Mr. Baker and Ms. John.

ICWA's provisions, including the reassumption requirement of § 1918(a) that we interpreted in *Nenana* and *F.P.*, apply only to "child custody proceedings" as defined by the statute.[27] ICWA's § 1903 specifically excludes from this definition an award of custody to one of the parents in a *divorce* proceeding. Ms. John relies on

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[25] *See id.* at 1215-16.

[26] *See id.* at 1216. *But see id.* at 1217-18 (Rabinowitz C.J., dissenting) (reasoning that "it is inconsistent with the doctrine of inherent tribal sovereignty to conclude that § 1918 of the ICWA and Public Law 280, taken together, divest tribes of even concurrent jurisdiction over child custody matters" (citation omitted)).

[27] *See* 25 U.S.C. §§ 1911, 1918.

this language to argue that ICWA is inapplicable to this dispute because it will result in a custody award to a parent. Thus, we must decide whether a custody battle between unmarried parents qualifies for the divorce exception to ICWA.[28]

Congress's intent in enacting ICWA suggests that the divorce exception should apply to this case. Congress created ICWA because it was alarmed by the number of Indian children removed by state agencies from their parents and tribes and placed into non-Indian homes.[29] In the policy declaration incorporated into ICWA itself, Congress stated that the statute's dual purpose was "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[30] The legislative history emphasizes this dual purpose, stating that the statute "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."[31]

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[28] Although the superior court ruled that ICWA did not apply to this custody dispute and neither party has appealed this aspect of the court's decision, Mr. Baker now argues that ICWA does apply. Even though Mr. Baker arguably has not preserved this issue for appeal, this court can affirm on any grounds. *See Gunderson v. University of Alaska, Fairbanks*, 922 P.2d 229, 236 n.9 (Alaska 1996). Moreover, we address the question of ICWA's applicability because it is "critical to a proper and just decision," and the "parties have had an opportunity to brief it." *In re K.E.*, 744 P.2d 1173, 1174 (Alaska 1987) (citation omitted).

[29] *See* 25 U.S.C. § 1901.

[30] 25 U.S.C. § 1902.

[31] H.R. Rep. No. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.

The custody dispute between Ms. John and Mr. Baker raises neither of the concerns ICWA sought to address. Whatever the outcome of the custody battle, John Jr. and Emmanuel will continue to split their time between the homes of their Native parents and their Native villages. Because this case does not pose the possibility that the children will be removed from their parents or their tribes, ICWA's exclusive jurisdiction provision as well as its intricate procedural guidelines are unnecessary to protect the family's or the tribes' interests.

Specific legislative history also suggests that Congress intended the divorce exception to apply to *any* parental custody dispute. Commenting on a draft of ICWA, the Department of the Interior wrote to Congress suggesting that it create exceptions to the type of proceedings covered by the Act. Stating that the "protections provided by this act are not needed in proceedings between parents," the Department of the Interior advocated for the divorce exception.[32] Apparently agreeing with the Department's view, Congress inserted the divorce exception into ICWA. The legislature's decision to create the exception based on the Department's opinion that ICWA's protections were unnecessary in disputes between *parents* suggests that Congress intended for the exception to apply to all parental custody battles.

Relying on the legislative history, the Bureau of Indian Affairs has concluded that Congress intended for the divorce exception to apply to all "domestic relations proceedings . . . so long as custody is awarded to one of

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[32] H.R. Rep. No. 95-1386, at 31.

the parents."[33] Additionally, the courts that have considered the question have concluded that ICWA does not apply to disputes between unmarried parents.[34] Based on this case law, the conclusions of the Bureau of Indian Affairs, and the purpose of ICWA as expressed in its text and legislative history, we conclude that ICWA does not apply to this inter-parental custody dispute.[35]

3. The Supreme Court's decision in *Venetie II* suggests that P.L. 280 does not apply to Native tribes occupying Alaska Native Claims Settlement Act lands.

The United States Supreme Court's recent *Venetie II* decision suggests that P.L. 280, which grants states jurisdiction over disputes in Indian country, has limited application in Alaska because most Native land will not qualify for the definition of Indian country.[36] By its very

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[33] Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,587 (1979). Although the Bureau of Indian Affairs did not promulgate these guidelines as regulations, they do represent its interpretation of the statute and as such the guidelines have important but not controlling significance. *See Batterton v. Francis*, 432 U.S. 416, 424-25 (1977).

[34] *See Walksalong v. Mackey*, 549 N.W.2d 384, 387 (Neb. 1996); *see also In re Defender*, 435 N.W.2d 717, 721-722 (S.D. 1989).

[35] We note that ICWA's inapplicability to all inter-parental custody disputes was an underlying assumption of our decision in *J.W. v. R.J.*, 951 P.2d 1206, 1214 (Alaska 1998).

[36] *See* 118 S. Ct. at 954-55.

text, P.L. 280 applies only to Indian country.[37] If Northway Village does not occupy Indian country, then our rulings interpreting P.L. 280 are not germane to this appeal.

In *Venetie II*, the Supreme Court interpreted the Alaska Native Claims Settlement Act (ANCSA),[38] which resolved Native claims to Alaska land by instituting a novel form of Native land ownership.[39] Under this innovative scheme, Congress revoked all existing Indian reservations in Alaska but one, and extinguished all aboriginal title and claims to Alaska land.[40] In exchange, ANCSA entitled Native-owned, state-chartered regional and village corporations to receive approximately forty-four million acres of land and $962.5 million in monetary compensation.[41]

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[37] The relevant portion of P.L. 280 reads as follows:

> (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties *which arise in the areas of Indian country listed* opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action . . . :
>
> | *State of* | *Indian country affected* |
> | --- | --- |
> | Alaska | All Indian country within the State. . . . |

28 U.S.C. § 1360(a).

[38] 43 U.S.C. § 1601 *et seq.*

[39] *See id.* at § 1601(a).

[40] *See id.* at § 1603.

[41] *See Alaska v. Native Village of Venetie Tribal Gov't (Venetie II)*, 118 S. Ct. 948, 951 (1998).

The *Venetie II* Court was faced with the question of whether ANCSA lands qualify as "Indian country" under a federal statute, 18 U.S.C. § 1151, defining the term. Under § 1151, three kinds of Native lands qualify as Indian country: Indian reservations under federal jurisdiction, Indian allotments, and "dependent Indian communities."[42] ANCSA revoked all federal Indian reservations in Alaska but one.[43] The Supreme Court held in *Venetie II* that a village occupying ANCSA lands does not qualify for the "dependent community" definition of Indian country.[44] *Venetie II*'s holding, therefore, appears to undermine the Indian country claims of those Alaska villages, like Northway Village, that occupy ANCSA lands.[45] If Northway Village does not occupy Indian country as a result of *Venetie II*, then P.L. 280 has no direct relevance to this appeal.

We conclude, then, that neither ICWA nor P.L. 280 applies to the case before us. Since *Nenana* and the decisions that followed it were rooted in the application of these statutes, the rationale underlying those precedents

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[42] *See* 18 U.S.C. § 1151; *Venetie II*, 118 S. Ct. at 952.

[43] *See* 43 U.S.C. § 1610(b). The sole post-ANCSA Indian reservation in Alaska is the Metlakatla Reservation on the Annette Islands. *See Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 920 (Alaska 1961), *rev'd in part*, 369 U.S. 45, 54-55 (1962).

[44] *See Venetie II*, 118 S. Ct. at 954-55.

[45] As Mr. Baker notes, some Indian country may still exist in Alaska under the second definition, Indian allotments. There has been no contention that Northway Village occupies such an allotment, however, and for the purposes of this appeal we assume that Northway Village is not Indian country.

is not specifically called into question today. We accordingly conclude that it is neither necessary nor appropriate at this time to reach the question of whether *Nenana* and its progeny were wrongly decided.[46]

We have determined that the central issue in this appeal – whether tribal courts have jurisdiction over non-ICWA child custody cases arising outside of Indian country – is not affected by our holdings in *Nenana* and *F.P.* To resolve it, we must instead explore the nature of tribal power under federal law.

C. Tribes without Indian Country Can Adjudicate Internal Child Custody Disputes.

Today we must decide for the first time a question of significant complexity and import: Do Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own

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[46] The United States argues that our prior interpretation of P.L. 280 remains relevant even if Northway Village does not occupy Indian country because it would be contrary to established law to conclude that a tribal court had greater powers outside, rather than inside, of Indian country. It is true that, generally, Indian nations possess greater powers in Indian country than they do outside it. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (holding that only in Indian country may tribes exercise powers over nonmembers). And at least one federal reservation does still exist in Alaska. Thus, the United States correctly notes in its brief that the recognition of Northway's jurisdiction creates a disjunction in Indian law jurisprudence. But this inconsistency does not create a justification to address issues that are not squarely before us.

members? After examining relevant federal pronouncements regarding sovereign power, we hold that Alaska Native tribes, by virtue of their inherent powers as sovereign nations, do possess that authority.

1. We defer to Congress's finding that Alaska Native tribes are sovereign powers under federal law.

We have previously held that tribal status is a nonjusticiable political question.[47] We therefore will defer to the determinations of Congress and the Executive Branch on the question of tribal status.[48] If Congress or the Executive Branch recognizes a group of Native Americans as a sovereign tribe, we "must do the same."[49]

Prior to 1993, no such recognition of Alaska villages had occurred. In *Native Village of Stevens v. Alaska Management & Planning*,[50] we conducted an historical analysis and concluded that the federal government had never recognized Alaska villages as sovereign tribes.[51] We relied on this analysis in *F.P.* to hold that Native villages lacked sovereignty.[52]

In 1993, however, the Department of the Interior issued a list of federally recognized tribes that included

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[47] *See Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977).

[48] *See Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 34-35 (Alaska 1988).

[49] *United States v. Holliday*, 70 U.S. 407, 419 (1865).

[50] 757 P.2d 32 (Alaska 1988).

[51] *See id.* at 34.

[52] *See In re F.P.*, 843 P.2d 1214, 1215 (Alaska 1992).

Northway Village and most of the other Native villages in Alaska.[53] In the list's preamble, the Department of Interior explained that it was issuing the list in order to clarify confusion over the tribal status of various Alaska Native entities. The Department believed that previous lists had been interpreted to mean that Native villages in Alaska, although qualifying for federal funding, were not recognized as sovereign tribes.[54] It sought to rectify this misunderstanding and to reaffirm the sovereign status of the recognized tribes. In particular, the Department emphasized that the list included those Alaskan entities that the federal government historically had treated as tribes.[55]

The Department also suggested in the preamble that its decision to publish the list was based on a recent opinion by the Solicitor of the Department of Interior, Thomas Sansonetti.[56] In this opinion, Sansonetti evaluated the sovereign tribal status of Alaska Native villages, conducting the same historical analysis as did the *Stevens* court but reaching the opposite conclusion.[57] Although recognizing that Alaska Native villages differed in significant ways from the tribes in the Lower 48, the Solicitor concluded that, for the last half century, Congress and the

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[53] *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs [hereinafter 1993 list], 58 Fed. Reg. 54,364, 54,368-69 (1993).

[54] *See id.* at 54,364.

[55] *See id.*

[56] *See id.* at 54,365.

[57] *See* U.S. Dep't Interior, Solic. Op. M-36,975 at 8-60 (Jan. 11, 1993).

Interior Department "have dealt with the Alaska Natives as though there were tribes in Alaska."[58]

The language in the preamble to the 1993 list unquestionably establishes that the Department of the Interior views the recognized Alaska villages as sovereign entities. The preamble affirms the Department's view that federally recognized tribes possess governmental authority and autonomy stemming from their tribal status:

> The Bureau of Indian Affairs . . . [finds] that the villages and regional tribes listed below have functioned as political entities exercising governmental authority. . . .
>
> . . . .
>
> The purpose of the current publication is . . . to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states. . . . *[T]he villages and regional tribes listed* below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they *have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.* . . . [59]

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[58] 1993 list, 58 Fed. Reg. at 54,365 (quoting the Solicitor's opinion).

[59] 1993 list, 58 Fed. Reg. at 54,365-66 (emphases added).

And for those who may have doubted the power of the Department of the Interior to recognize sovereign political bodies, a 1994 act of Congress appears to lay such doubts to rest. In the Federally Recognized Tribe List Act of 1994,[60] Congress specifically directed the Department to publish annually "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[61] The Department published tribal lists for 1995 through 1998, all of which include Alaska Native villages such as Northway, based on this specifically delegated authority.[62]

The text and legislative history of the Tribe List Act demonstrate that Congress also views the recognized tribes as sovereign bodies. In the Act's findings section, Congress discusses the "sovereignty" of federally recognized tribes.[63] Similarly, the House report to the Act provides that federal recognition "institutionalizes the

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[60] 25 U.S.C. § 479a *et seq.* (West Supp. 1998).

[61] *Id.* at § 479a-1.

[62] *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 60 Fed. Reg. 9250, 9255 (1995); *see also* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 61 Fed. Reg. 58,211, 58,215 (1996); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 62 Fed. Reg. 55,270, 55,275 (1997); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 63 Fed. Reg. 71,941, 71,945 (1998).

[63] *See* P.L. 103-454, 108 Stat. 4791 (1994).

tribe's quasi-sovereign status."[64] Acknowledging that federal recognition "is no minor step," the report states that such recognition "permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation.' "[65]

Through the 1993 tribal list and the 1994 Tribe List Act, the federal government has recognized the historical tribal status of Alaska Native villages like Northway. In deference to that determination, we also recognize such villages as sovereign entities.

The fact that Northway Village is a federally recognized tribe answers only part of the question posed by this case. Alaska Native villages such as Northway are in a unique position: Unlike most other tribes, Alaska Native villages occupy no reservations and for the most part possess no Indian country. Mr. Baker and the dissent argue that the existence of tribal land – Indian country – is the cornerstone of tribal court jurisdiction and that Congress necessarily withdrew such jurisdiction from Alaska Native villages when it enacted ANCSA.

To evaluate this argument, we must decide how much authority tribes retain in the absence of reservation

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[64] H.R. Rep. No. 103-781, at 2-3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768, 2769.

[65] *Id.* at 2. The legislative history to the Act reveals that Congress recognized the dispute over the existence of Indian country in Alaska and did not intend for the tribal recognition list to resolve the dispute. *See id.* at 4-5. But Congress's ambivalence on the Indian country issue does not undermine its recognition of the tribal status of Alaska Native villages.

land. We must, in other words, determine the meaning of "sovereignty" in the context of Alaska's post-ANCSA landscape by asking whether ANCSA, to the extent that it eliminated Alaska's Indian country, also divested Alaska Native villages of their sovereign powers.

2. Tribes retain their sovereign powers to regulate internal domestic affairs unless Congress specifically withdraws their authority to act.

The extent of tribal self-government depends on the intent of Congress.[66] We begin our analysis of congressional intent with the established principle under federal law that "Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe's dependent status."[67] The United States Supreme Court explained in *United States v. Wheeler*[68] that this starting point stems from the fact that tribal governance predates the founding of our nation: "The powers of Indian tribes are, in general, inherent powers of a limited sovereignty which has never been extinguished. Before the coming of the Europeans, the tribes were self-governing sovereign political communities. . . . The sovereignty that the Indian tribes retain is of a unique and limited character."[69]

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[66] *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980); *United States v. Wheeler*, 435 U.S. 313, 322-33 (1978).

[67] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982); *see also Wheeler*, 435 U.S. at 323.

[68] 435 U.S. 313 (1978).

[69] *Id.* at 322-33 (citations and internal quotation marks omitted).

Modern tribal sovereignty is certainly not absolute; "[i]t exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, . . . Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[70] In explaining this rule, the Supreme Court has articulated a core set of sovereign powers that remain intact even though Indian nations are dependent under federal law; in particular, internal functions involving tribal membership and domestic affairs lie within a tribe's retained inherent sovereign powers.[71]

Alaska law, too, has long recognized that sovereign powers exist unless divested. For example, we stated in *Ollestead v. Native Village of Tyonek*[72] that "the principle that Indian tribes are sovereign, self-governing entities" governs "all cases where essential tribal relations or rights of Indians are involved."[73] We recognized then that "Indian affairs are subject to state law but only to the extent that Congress explicitly so provides."[74] In accordance with the Supreme Court's approach in *Wheeler*, reiterated in cases following that decision[75] and

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[70] *Id.* at 323.

[71] *See, e.g., Wheeler*, 435 U.S. at 326; *Montana v. United States*, 450 U.S. 544, 564 (1981). Part III.C.4 *infra* contains a full discussion of the scope of retained sovereignty.

[72] 560 P.2d 31, 33 (Alaska 1977).

[73] *Id.*

[74] *Id.*

[75] *See, e.g., Montana*, 450 U.S. at 563-67; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

established under Alaska law, we presume that tribal sovereign powers remain intact. Thus, we begin by evaluating federal statutes affecting Alaska Natives in order to determine whether Congress has explicitly revoked the inherent sovereignty of Alaska's Native tribes by eliminating their Indian country.

The dissent, however, asks us to begin from the opposite premise. Rather than following the teachings of federal and state law that respect tribal sovereignty by presuming that sovereign power exists unless divested, the dissent quotes language from *Mescalero Apache Tribe v. Jones*,[76] in which the United States Supreme Court noted that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens."[77] From this statement the dissent deduces what it terms an "allocative principle."[78] Based upon *Mescalero*'s language, the dissent formulates a presumption that would reverse the basic rule and require courts, at least outside of Indian country, to refuse to recognize tribal jurisdiction unless an act of Congress specifically authorizes the exercise of tribal adjudicatory power. We refuse to accept this invitation to deny the existence of tribal sovereignty and to turn federal law on its head.

The dissent's "allocative principle" thesis ignores the teachings of *Wheeler* and the decisions that follow it. In these post-*Mescalero* decisions, the Court has not focused

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[76] 411 U.S. 145 (1973).

[77] *Id.* at 148-49.

[78] Dissent at 81-86.

on tribal land as determinative of tribal authority. Instead of interpreting the *Mescalero* language as an across-the-board prohibition of tribal sovereignty in the absence of Indian country, for example, the Court in *Montana v. United States*[79] reconciled the general rule that tribal sovereignty exists unless specifically divested with the *Mescalero* language that state law applies to natives beyond reservation land. But *Montana*, in contrast to the dissent, articulates no test making the existence of reservation land determinative of tribal power. Instead, the *Montana* Court explained that *Mescalero* stands for the proposition that an express congressional delegation of power is required to sustain tribal power when the tribe has sought to control matters outside the scope of internal governmental authority: "[E]xercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[80] The Court has continued to adhere to this proposition, requiring express Congressional delegation of power only when a tribe seeks to exercise power outside of its core sovereign authority.[81]

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[79] 450 U.S. 544 (1981).

[80] *Id.* at 564 (emphasis added) (citing *Mescalero*, 411 U.S. at 148).

[81] *See, e.g., Duro v. Reina*, 495 U.S. 676, 685-88 (1990). In *Duro*, the Court held that tribes lacked criminal jurisdiction over nonmember Indians. *See id.* Shortly after the decision, Congress provided for tribal criminal jurisdiction over nonmember Indians. *See* 25 U.S.C. §§ 1301-03 (1983 & Supp. 1998).

Thus, in determining whether tribes retain their sovereign powers, the United States Supreme Court looks to the character of the power that the tribe seeks to exercise, not merely the location of events. We accordingly decline to adopt the dissent's approach and instead follow federal law by beginning from the premise that tribal sovereignty with respect to issues of tribal self-governance exists unless divested. Congress has recognized that a tribe has a strong interest in "preserving and protecting the Indian family as the wellspring of its own future."[82] Because Northway Village's status as a federally recognized tribe is undisputed and its adjudication of child custody disputes over member children is necessary "to protect tribal self-government or to control internal relations," its tribal courts require no express congressional delegation of the right to determine custody of tribal children.

Finally, we note a tenet of federal Indian law on statutory interpretation that informs our analysis of this issue. Supreme Court precedent supplies clear instructions for interpreting ambiguous statutes: Courts must resolve ambiguities in statutes affecting the rights of Native Americans in favor of Native Americans.[83] Thus,

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[82] H.R. Rep. No. 95-1386, at 19.

[83] *See In re F.P.*, 843 P.2d 1214, 1219 (Alaska 1992); *see also South Dakota v. Yankton Sioux Tribe*, 118 S. Ct. 789, 800 (1998) (recognizing canon of Indian law that federal laws affecting tribal sovereignty should be "construed narrowly in favor of retaining Indian rights"); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (stating "we must be guided by the eminently sound and vital canon . . . that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful

we will not lightly find that Congress intended to eliminate the sovereign powers of Alaska tribes.

3. ANCSA itself and post-ANCSA federal statutes regarding tribal sovereignty all support Northway's jurisdiction over child custody matters.

Ample evidence exists that Congress did not intend for ANCSA to divest tribes of their powers to adjudicate domestic disputes between members. Congress intended ANCSA to free Alaska Natives from the dictates of "lengthy wardship or trusteeship,"[84] not to handicap tribes by divesting them of their sovereign powers. As a principal author of the law has explained, ANCSA "rejected the paternalism of the past and gave Alaska Natives an innovative way to retain their land and culture without forcing them into a failed reservation system."[85] But nowhere does the law express any intent to force Alaska Natives to abandon their sovereignty.

Outside of ANCSA, too, ample evidence exists that Congress did not intend for ANCSA to divest tribes of

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expressions being resolved in favor of the Indians") (internal quotation marks, ellipsis and citations omitted).

[84] *Alaska v. Native Village of Venetie Tribal Gov't (Venetie II)*, 118 S. Ct. 948, 956 (1998).

[85] Senator Ted Stevens, Address Before the Alaska Legislature (Apr. 2, 1997), *in* Senate and House Joint Journal Supp. No. 9 at 5, 1997 House Journal 915, *quoted in* Donald C. Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 Alaska L. Rev. 353, 440 (1997).

their powers to adjudicate domestic disputes between members. Post-ANCSA congressional actions such as the Tribe List Act, ICWA, and the Tribal Justice Act indicate that Congress intended for post-ANCSA Alaska Natives to continue to regulate their internal affairs.

We noted above that the Tribe List Act shows Congress's determination that Alaska Native villages are sovereign entities. The inclusion of Alaska Native villages on the tribal lists makes clear that Alaska Natives "have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes."[86] And since this court defers to determinations of tribal status by the Executive Branch or by Congress, we similarly accept their conclusion that, even after ANCSA, federally recognized Alaska Native tribes like Northway Village retain sovereignty to adjudicate domestic disputes between members.

To hold otherwise would render the Tribe List Act hollow: If tribes that do not occupy Indian country have no inherent powers of self-governance, the language in the Tribe List Act that expressly reserves to these tribes "the right . . . to exercise the same inherent and delegated authorities available to other tribes"[87] would be virtually meaningless. We find untenable the conclusion that Congress intended for the Tribe List Act to be an empty gesture.

The passage of ICWA seven years after ANCSA's enactment also makes clear that Congress did not intend

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[86] 58 Fed. Reg. 54,366 (1993).

[87] *Id.*

ANCSA to eradicate tribal court jurisdiction over family law matters. ICWA's goal was to increase tribal control over custody decisions involving tribal children. Congress viewed this increased control as vital to the continued sovereignty of the tribes. In the legislative history to ICWA, Congress cited with approval a decision stating that "there can be no greater threat to 'essential tribal relations,' and no greater infringement on the right of the . . . tribe to govern themselves than to interfere with tribal control over the custody of their children."[88] Alaska Native villages are explicitly included within ICWA's scope.[89]

ICWA's very structure presumes both that the tribes covered by the Act are capable of adjudicating child custody matters in their own courts and that tribal justice systems are appropriate forums for resolution of child custody disputes.[90] Indeed, legislative history reveals that ICWA's jurisdictional framework was motivated by concerns over the "failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families *and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.*"[91] Although the custody dispute at the center of this case falls outside ICWA's scope, Congress's purpose in enacting ICWA

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[88] *See* H.R. Rep. No. 95-1386 at 15 (alteration in original) (quoting *Wakefield v. Little Light*, 347 A.2d 228, 237-38 (1975)).

[89] *See* 25 U.S.C. § 1903(8).

[90] *See id.* at § 1911 (providing for extended tribal court jurisdiction in the field of child custody).

[91] H.R. Rep. No. 95-1386 at 19 (emphasis added).

reveals its intent that Alaska Native villages retain their power to adjudicate child custody disputes.

The Tribal Justice Act,[92] enacted in 1993, further evidences the congressional view that the Native villages retain governmental powers. The Act provides financial support for tribal court activities without drawing distinctions between those tribes that occupy Indian country and those that do not and specifically includes Alaska Native villages recognized as tribes within its scope.[93] Additionally, in the Act's findings section, Congress recognizes that all "Indian tribes possess the inherent authority to establish their own form of government," that "tribal justice systems [are] the appropriate forums for the adjudication of disputes affecting personal and property rights," and that "traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes."[94]

Based on the intent of Congress, as revealed by the Tribe List Act, ICWA, and the Tribal Justice Act, we conclude that Alaska Native villages do possess governmental powers over child custody matters.[95] We next

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[92] 25 U.S.C. § 3601 *et seq.* (West Supp. 1998).

[93] *See* 25 U.S.C. § 3601, 3602(3).

[94] *Id.* at § 3601(4), (6), (7).

[95] *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 265-66 (1992) (holding that "when two [or more] statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (alteration in original) (internal quotation marks omitted)).

examine federal decisional law regarding tribal sovereignty to see what guidance they provide on the issue of Northway's post-ANCSA jurisdiction.

4. Federal case law suggests that post-ANCSA, Alaska's tribes retain non-territorial sovereignty that includes power over child custody disputes.

Ms. John and the amici argue that the existence of Indian country is linked only to the tribe's power over land and nonmembers, not to its power over members. Thus, they claim that even if Northway Village does not occupy Indian country, it can nevertheless adjudicate disputes between its members.

Because the traditional reservation-based structure of tribal life in most states forms the backdrop for the federal cases, courts have not had occasion to tease apart the ideas of land-based sovereignty and membership sovereignty. Consequently, the federal decisions do not conclusively answer the question of what happens when a law like ANCSA separates membership and land completely by allowing a federally recognized tribe to redefine its relationship to state and federal governments by eliminating the idea of Indian country. But federal case law does provide significant support for our conclusion that federal tribes derive the power to adjudicate internal domestic matters, including child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy.

The federal decisions discussing the relationship between Indian country and tribal sovereignty indicate

that the nature of tribal sovereignty stems from two intertwined sources: tribal *membership* and tribal *land*. The United States Supreme Court has recognized the dual nature of Indian sovereignty for more than a century and a half; the Court has explained that, under federal law, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."[96] Tribes not only enjoy the authority to exercise control within the boundaries of their lands, but they also possess the inherent "power of regulating their internal and social relations."[97]

Mr. Baker and the dissent argue that many federal decisions construing the nature of tribal sovereignty view the existence of Indian country as the critical factor in determining the existence or extent of tribal authority. But the case law does not fairly support the view that the existence of Indian country is an absolute prerequisite to the existence of sovereign tribal power.

To the contrary, in a series of decisions exploring the nature of tribal sovereignty, the Court has noted the crucial role tribal membership plays in defining the scope of tribal authority. The distinction between members and nonmembers has often been treated as a dispositive factor in federal Indian jurisprudence. In *United States v. Wheeler*,[98] for example, the Court held that although

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[96] *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (citing *Worcester v. Georgia*, 6 Pet. 515, 557 (1832)).

[97] *Id.* (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)).

[98] 435 U.S. 313 (1978).

tribes enjoy less sovereignty than foreign nations by virtue of their dependent relationship with the federal government, tribes retain the core power to regulate internal affairs:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. They cannot enter into direct commercial or governmental relations with foreign nations. And, as we have recently held, they cannot try nonmembers in tribal [criminal] courts.
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. *But the powers of self-government,* including the power to prescribe and enforce internal criminal laws, are of a different type. They *involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.*[99]

Other decisions similarly stress the importance of tribal power to regulate internal domestic relations. Three years after *Wheeler,* the Court in *Montana v. United States*[100] reaffirmed the significance of tribal membership and reaffirmed the importance of Native American self-governance: "Thus, in addition to the power to punish

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[99] *Id.* at 326 (citations omitted).

[100] 450 U.S. 544 (1981).

tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members."[101] The Court has stated that a tribe's authority to "determine rights to custody of a child of divorced parents of the tribe" falls within the boundaries of inherent tribal sovereignty.[102] Again in 1990, the Court in *Duro v. Reina*[103] emphasized the fundamental importance of membership, noting the federal law's consistency "in describing retained tribal sovereignty . . . in terms of a tribe's power over its members."[104] In deciding that the Salt River Pima-Maricopa tribe was without jurisdiction to prosecute criminally a man not eligible for membership, the Court emphasized the crucial distinction between members and nonmembers of the tribe. The court also noted the importance of membership throughout different areas of federal Indian law, including taxation, regulation of hunting and fishing, and civil and criminal court jurisdiction.[105]

The Supreme Court has also applied these principles in the specific context of tribal authority to handle civil disputes in tribal justice systems. Tribes "have power to make their own substantive law in internal matters, and

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[101] *Id.* at 564 (citation omitted).

[102] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) (citing *Fisher v. District Court*, 424 U.S. 382 (1976)).

[103] 495 U.S. 676 (1990).

[104] *Id.* at 685.

[105] *See id.* at 686-89.

to enforce that law in their own forums."[106] And tribal courts may also have jurisdiction to "resolve civil disputes involving nonmembers, including non-Indians"[107] when the civil actions involve essential self-governance matters such as membership or other areas where "the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination."[108] The key inquiry, according to the Court, is not whether the tribe is located in Indian country, but rather whether the tribe needs jurisdiction over a given context to secure tribal self-governance: "If state-court jurisdiction over Indians . . . would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law."[109]

Fisher v. District Court[110] provides an example of the Supreme Court's recognition of the dual nature of sovereignty in the case law. *Fisher*, like the case before us, was a family law dispute between Native American parents. The Northern Cheyenne Tribal Court removed Ivan Fisher from his mother's home and placed him with another tribal member, who wished to adopt him.[111] In

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[106] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (citations omitted).

[107] *Duro v. Reina*, 495 U.S. 676, 687 (1990) (citing *Santa Clara*, 436 U.S. at 65-66; *Williams v. Lee*, 358 U.S. 217, 223 (1959)).

[108] *Id.* at 688 (citing *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989)).

[109] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) (citing *Fisher v. District Court*, 424 U.S. 382 (1976)).

[110] 424 U.S. 382 (1976).

[111] *See id.* at 383.

determining that the *Montana* state courts had no jurisdiction over the Runsaboves' adoption proceeding, the Supreme Court noted that the tribal court had exclusive jurisdiction in part because "the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation."[112] But two paragraphs later the Court stated that "[t]he exclusive jurisdiction of the Tribal Court . . . [derives] from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law."[113] This description of Native sovereignty as stemming from the tribe itself is at odds with the dissent's theory that a tribe's ability to adjudicate internal disputes is premised solely on the basis of its location within Indian country.

Fisher therefore reflects both a recognition of territorial bases of sovereignty and an understanding that tribal status itself includes the power to adjudicate internal child custody disputes. Indeed, the *Fisher* court concluded that allowing *Montana*'s state courts to hear the custody case between Native parents "plainly would interfere with the powers of self-government . . . exercised through the Tribal Court" and voiced its concern that such usurpation "would cause a corresponding decline in the authority of the Tribal Court."[114] Although that case took place on a reservation, the considerations of noninterference and respect for tribal forums invoked by the *Fisher* court apply outside of Indian country.

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[112] *Id.* at 389.

[113] *Id.* at 390.

[114] *Id.* at 387-88.

The dissent interprets *Fisher* in quite a different way. Along with *DeCoteau v. District County Court*,[115] *Fisher* is one of two decisions that the dissent believes illustrates its theory that no tribal court jurisdiction whatsoever can exist without Indian country. But these decisions do not support the dissent's thesis that tribal sovereignty exists only within Indian country.

DeCoteau involved the narrow jurisdictional issue of whether South Dakota's state courts could assert any jurisdiction over the conduct of tribal members on a reservation, something normally within the tribe's exclusive jurisdiction. The Court expressly stated that the only issue presented by the case was whether the reservation existed;[116] the Court did not consider the implications of the reservation's existence because it accepted a stipulation by the parties that the state had jurisdiction if the reservation had been terminated by Congress.[117] After describing the legal agreement between the parties, which the Court assumed without deciding was an accurate one,[118] the Court noted in footnote 2 that the parties relied on 11 U.S.C. §§ 1151(a) and (c) in formulating their stipulation. This statute defines "Indian country" for purposes of criminal jurisdiction, and the Court noted that the law "generally applies as well to questions of civil jurisdiction."[119] Footnote 2 amounts, then, to little more than a passing recognition of settled case law interpreting

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[115] 420 U.S. 425 (1975).

[116] *See id.* at 427.

[117] *See id.* at 426-28 & n.3.

[118] *See id.*

[119] *Id.* at 427 n.2.

that statute's usual meaning and scope. That this was all the Court meant to say in footnote 2 is illustrated by the Court's reference to that footnote in *Venetie II*, which cited *DeCoteau* not for any bright-line jurisdictional test but only for the long-standing holding that § 1151 generally applies to both criminal and civil cases.[120] Moreover, the *Venetie II* court makes clear that any allocative significance that exists in the concept of Indian country pertains to a tribe's territorial power over its land, not its members.[121]

Fisher teaches even less about the existence of any kind of rule equating Indian country with sovereign adjudicatory power. The *Fisher* Court asked only whether *Montana* had any basis to assert *concurrent* jurisdiction over the Runsaboves' adoption proceeding; it assumed that the tribal court retained some form of jurisdiction, either exclusive or concurrent, stemming from the tribe's right to govern itself.[122] Because it found that state court jurisdiction would interfere with the tribe's self-governance and diminish the authority of the tribal court, and because the state had no interest in the dispute since all relevant events took place on Indian land, the Court held

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[120] *See Alaska Native Village of Venetie Tribal Gov't (Venetie II)*, 118 S. Ct. 948, 952 (1998).

[121] *See id.* at 952 n.1 (noting that tribes and the federal government have "primary jurisdiction over *land* that is Indian country" but saying nothing about jurisdiction over members) (emphasis added).

[122] *See Fisher*, 424 U.S. at 386-89.

that the tribe had exclusive jurisdiction over the adoption.[123] But *Fisher* does not imply that jurisdiction must lie exclusively in one forum or another. The Supreme Court viewed the case before it as one in which Indian jurisdiction was unquestioned and the only issue presented was whether *Montana* had any form of jurisdiction at all. Thus, *Fisher*'s holding – that Indian land may be a prerequisite to *exclusive* tribal jurisdiction – in no way answers the question of whether the tribal court retains *concurrent* jurisdiction over tribal relations without such land.[124]

Following in the line of *Wheeler* and *Montana*, a pair of recent tax decisions illustrates that *DeCoteau* and *Fisher* leave today's dispute unanswered. And they indicate that the Supreme Court has been careful to note that the general rule that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State"[125] – the source of the dissent's "allocative principle" – does not mean that a tribe must forego its

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[123] *See id.* at 387-89 & n.14.

[124] The dissent also describes *Solem v. Bartlett*, 465 U.S. 463 (1984), as a case discussing "jurisdiction over 'lands' in order to determine jurisdiction over tribal members." Dissent at 101. But *Solem* determines the existence of Indian country for the purpose of applying an Act of Congress that vests the *federal government* with exclusive jurisdiction over certain crimes committed on Indian reservations, and thus does not address tribal jurisdiction except in the context of that Act. *See id.* at 464-65 & nn.1 & 2.

[125] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

fundamental self-governance because of a lack of Indian country. In *Oklahoma Tax Commission v. Sac and Fox Nation*,[126] the Court specifically declined to answer the question of "whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the state's ability to tax income . . . when the employee does not reside in Indian country."[127] Two years later, in *Oklahoma Tax Commission v. Chickasaw Nation*,[128] the Supreme Court emphasized that the question of a tribe's internal powers absent Indian country was undecided, but implied that a tribe's ability to retain fundamental powers of self-governance is the more important principle.

The *Chickasaw Nation* Court held that Oklahoma could not collect several challenged taxes within an Indian reservation but could collect taxes on tribal members living outside Indian country. The court noted that generally applicable state laws are usually enforceable against Natives in the absence of Indian country.[129] But the Court also implied that its result would be different had the parties' dispute implicated the tribal self-governance concerns raised by a family law matter integral to tribal self-governance. In explaining its rationale, the Supreme Court said: "Notably, the Tribe has not asserted here, or before the Court of Appeals, that the State's tax infringes on tribal self-governance."[130] Only after *twice*

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[126] 508 U.S. 114 (1993).

[127] *Id.* at 126 (citations omitted).

[128] 515 U.S. 450 (1995).

[129] *See id.* at 465.

[130] *Id.* at 464.

emphasizing that the *Chickasaw Nation* did not raise self-governance claims and that the Court was thus procedurally foreclosed from considering such arguments did the Court reach its decision.[131]

The custody dispute between Ms. John and Mr. Baker lies at the core of sovereignty – a tribe's "inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members."[132] By deliberately leaving the door open for tribal governments to conduct internal self-governance functions in the absence of Indian country, *Chickasaw Nation* and *Sac and Fox Nation* suggest that Northway Village has jurisdiction to hear this dispute because the right to determine custody of Indian children, unlike Oklahoma's motor fuels tax, "infringes on tribal self-governance."[133]

As recently as last year, the Supreme Court reaffirmed the notion that the existence of Indian country is not a dispositive factor in determining jurisdiction. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,[134] the Court held that tribes enjoy sovereign immunity from civil lawsuits asserting contract claims regardless of whether the contracts were formed on or off Indian land.[135] Although the case dealt with a different

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[131] *See id.* at 464-65 & n.14.

[132] *Montana v. United States*, 450 U.S. 544, 564 (1981); *see also United States v. Wheeler*, 435 U.S. 313, 322-28 (1978).

[133] *Chickasaw Nation*, 515 U.S. at 464.

[134] 118 S. Ct. 1700 (1998).

[135] *See id.* at 1705.

set of factual circumstances than the present dispute, it is notable that only the *Kiowa Tribe* dissenters believed that the "generally applicable state laws" rule should apply to hold the tribe subject to suit for a promissory note executed outside of Indian country.[136] Although the dissenters claimed that the immunity doctrine should not apply to conduct unrelated to the tribe's Indian country,[137] the majority refused to accept this narrow territorial conception.[138] We similarly refuse to accept it today.

Decisions of the United States Supreme Court support the conclusion that Native American nations may possess the authority to govern themselves even when they do not occupy Indian country.[139] The federal decisions contain language supporting the existence of tribal sovereignty based on either land or tribal status. Indian law jurisprudence stresses the central importance of membership and the fundamental powers of tribes to adjudicate internal family law affairs like child custody disputes. Decisions like *Chickasaw Nation* and *Sac and Fox Nation* suggest that tribes without Indian country do possess the power to adjudicate internal self-governance matters. We hold that the type of dispute before us today – an action for determination of custody of the children of

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[136] *See id.* at 1705-08 (Stevens, J., dissenting).

[137] *See id.* at 1707.

[138] *See id.* at 1705.

[139] At least one federal judge has voiced the opinion that in enacting ANCSA, Congress intended that Native villages retain sovereignty over members even though such sovereignty was "without territorial reach." *State of Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't*, 101 F.3d 1286, 1303 (9th Cir. 1996) (Fernandez, J. concurring).

a member of Northway Village – falls squarely within Northway's sovereign power to regulate the internal affairs of its members.

Although Ms. John is not a member of Northway Village, she argues that the children themselves are eligible for tribal membership. This is a critical fact that must be determined by the superior court on remand, as we discuss in Part III.E.3. A tribe's inherent sovereignty to adjudicate internal domestic custody matters depends on the membership or eligibility for membership of the child. Such a focus on the tribal affiliation of the children is consistent with federal statutes such as ICWA, which focuses on the child's tribal membership as a determining factor in allotting jurisdiction.[140] Because the tribe only has subject matter jurisdiction over the internal disputes of tribal members, it has the authority to determine custody only of children who are members or eligible for membership.[141]

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[140] *See* 25 U.S.C. § 1903(4) (defining "Indian child" under ICWA as a child who is a tribal member or eligible for membership).

[141] Consent of both parents may be an alternative basis for tribal court jurisdiction in child custody cases, as federal law supports the determination that tribes have jurisdiction over consenting nonmembers in some situations. *See Montana v. United States*, 450 U.S. 544, 565 (1981) (recognizing a tribe's power to regulate activities of nonmembers who enter consensual relationships with the tribe or its members). Here, Ms. John consented to have this action decided in a Northway tribal forum. But we need not decide at this time whether her consent is sufficient to confer jurisdiction on the tribal court in this case, given that we remand for determination of the children's tribal affiliation.

5. Alaska's state courts retain concurrent jurisdiction over this dispute.

Although we recognize Northway's jurisdiction to adjudicate child custody disputes between village members, its jurisdiction is not exclusive. The State of Alaska can also exercise jurisdiction over such disputes. This is so because villages like Northway presumably do not occupy Indian country, and federal law suggests that the only bar to state jurisdiction over Indians and Indian affairs is the presence of Indian country.[142] Outside Indian country, all disputes arising within the State of Alaska, whether tribal or not, are within the state's general jurisdiction.[143] Thus the state, as well as the tribe, can adjudicate such disputes in its courts. A tribe's inherent jurisdiction does not give tribal courts priority, or presumptive authority, in disputes involving tribal members.

Several state and federal courts have also recognized the existence of concurrent state-tribal jurisdiction over tribal family law disputes when one or both parents do not reside on reservation land. For example, in *In re Marriage of Skillen*,[144] the Supreme Court of Montana considered whether *Montana* state courts had jurisdiction to hear a dispute over the custody of an Indian child. One of the parties was the child's non-Indian father, who lived off the reservation.[145] After discussing congressional

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[142] *See, e.g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

[143] *See* AS 22.10.020(a).

[144] 956 P.2d 1 (1998).

[145] *See id.* at 4-5.

intent as revealed in ICWA, the UCCJA, and the Parental Kidnapping Prevention Act (PKPA)[146] and examining federal case law, the *Montana* court determined that tribal courts have exclusive jurisdiction over children domiciled on reservation land and that "when an Indian child resides off the reservation, the state court and tribal court share concurrent jurisdiction."[147] The *Skillen* court noted that recognition of concurrent jurisdiction reflected the delicate balance under federal law of a state court's "obligation to respect the sovereignty of Indian tribes in relation to [the court's] responsibility to uphold and enforce the laws of this state."[148]

Although we base our decision in this case on the decisions of Congress and the Supreme Court, we, like the *Skillen* court, also believe that policy considerations support our recognition of concurrent jurisdiction. Tribal jurisdiction over child custody cases involving member children will further the goal under both federal and state

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[146] 28 U.S.C. § 1738A(a).

[147] *Skillen*, 956 P.2d at 18; *see also In re Larch*, 872 F.2d 66, 69 (4th Cir. 1989) (noting that ICWA "discloses that Congress recognized that there can be concurrent jurisdiction in state and tribal courts"); *United States ex rel. Cobell v. Cobell*, 503 F.2d 790, 795 (9th Cir. 1974) (holding that, in a custody case between tribal members where the children reside off the reservation, the tribe and state would share concurrent jurisdiction if the tribe's law had not explicitly disclaimed tribal jurisdiction over marriage, divorce, and adoption); *Wells v. Wells*, 451 N.W.2d 402, 405 (S.D. 1990) (recognizing concurrent state-tribal jurisdiction over a custody action between a Native American mother and a non-Indian father where the mother and children moved off the reservation).

[148] *Skillen*, 956 P.2d at 18.

law of best serving the needs of Native American children.

For example, the fact that many of Alaska's Native villages are located far from the courtrooms of our state trial courts limits our state judicial system's ability to respond to the needs of many Alaska Natives.[149] Moreover, we have recognized that Alaska is home to "uniquely divergent cultures," including many "Native cultures which remain today much as they were prior to the infusion of Anglo-American culture."[150] Because of this great diversity, barriers of culture, geography, and language combine to create a judicial system that remains foreign and inaccessible to many Alaska Natives.[151] These differences have "created problems in administering a unified justice system sensitive to the needs of Alaska's various cultures."[152] By acknowledging tribal jurisdiction, we enhance the opportunity for Native villages and

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[149] *See, e.g., Alaska Court System, Report of the Alaska Supreme Court Advisory Committee on Fairness and Access ix* (1997) ("Urban residents have far more access to justice system services than village residents. One-fourth of Alaskans do not live within reasonable reach of many court system services."); *id.* at 104-11 (noting dramatic access problems for rural Alaskans).

[150] *Calista Corp. v. Mann*, 564 P.2d 53, 61 (Alaska 1977).

[151] *See, e.g., Alaska Court System, Report of the Alaska Supreme Court Advisory Committee on Fairness and Access* 49 (1997) ("Many [interviewees] believed that the courts do not understand Alaska Native cultures and family structures. . . ."); *id.* at 92 (noting that 36% of Alaska Natives speak a Native language at home).

[152] *Calista*, 564 P.2d at 61.

the state to cooperate in the child custody arena by sharing resources. Recognizing the ability and power of tribes to resolve internal disputes in their own forums, while preserving the right of access to state courts, can only help in the administration of justice for all.[153]

The continuing existence of concurrent state jurisdiction also lays to rest a number of the dissent's concerns. Contrary to the dissent's assertions that "[t]he doors of Alaska's courts will no longer be open to all Alaskans"[154] and that urban Alaska Natives will be required to adjudicate their cases in remote villages,[155] Native parents who live in Anchorage and do not wish to avail themselves of a distant tribal forum will still be able to resolve their custody disputes in Anchorage Superior Court. Indeed, Alaska Natives who for any reason do not wish to have their disputes adjudicated in a tribal court will retain complete and total access to the state judicial system. Because state courts retain concurrent jurisdiction, there is no "mandatory tribal court jurisdiction."[156]

The existence of concurrent state jurisdiction also reveals the inapplicability of the dissent's proposed

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[153] *See, e.g., Alaska Court System, Report of the Alaska Supreme Court Advisory Committee on Fairness and Access 107-08* (1997) (recommending that state courts "greatly enhance equality in the effective delivery of justice system services by associating or blending [ ] local resources [like tribal courts] with the formal court system" and noting that "[t]he western justice system is not always the most appropriate model for the problems of many rural areas").

[154] Dissent at 62.

[155] Dissent at 158.

[156] Dissent at 155.

"allocative principle" to our decision today. Even if there existed an iron-clad rule that state law must always apply to Natives outside of Indian land, the outcome we reach today would not violate that rule. *Mescalero* teaches that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens."[157] The dissent, citing no persuasive authority, mistakenly attempts to shape this statement into a rule between competing exclusive jurisdictions. But because the jurisdiction of Alaska state courts remains unaffected by our recognition of concurrent tribal court jurisdiction, the dissent's argument in this regard is essentially a straw man. Our formulation does not rob the state of its exercise of judicial power over Alaska Natives; rather, the state will continue to address these disputes either directly, through the exercise of concurrent jurisdiction, or indirectly, through the doctrine of comity.

D. Tribal Law Applies to Child Custody Disputes Adjudicated by Tribal Courts.

Ms. John and the amici argue that Northway should be able to apply its own law, including tribal law and custom, in resolving a custody dispute that falls within its jurisdiction. We agree.

Decisions addressing tribal power to adjudicate internal matters state that tribes have the "power to make their own substantive law in internal matters and to

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[157] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

enforce that law in their own forums."[158] Similarly, the Supreme Court has stressed that tribal sovereignty is valuable precisely because it enables Native Americans "to control their own internal relations, and to preserve their own unique customs and social order."[159] Because Alaska Native tribes have inherent sovereignty to adjudicate internal tribal disputes, the tribes must be able to apply their tribal law to those disputes. Thus, tribal sovereignty over issues like family relations includes the right to enforce tribal law in resolving disputes.

E. The Doctrine of Comity Properly Governs State Recognition of Tribal Court Decisions.

We must also determine whether the superior court should have dismissed Mr. Baker's identical state suit. After examining whether states should afford tribal court judgments full faith and credit, we conclude that the comity doctrine provides the proper framework for deciding when state courts should recognize tribal court decisions.

1. Full faith and credit

ICWA requires courts to extend full faith and credit to tribal court decisions involving "child custody

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[158] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (citations omitted); *see also United States v. Quiver*, 241 U.S. 602, 603-604 (1916).

[159] *Duro v. Reina*, 495 U.S. 676, 685-86 (1990).

proceedings" as that term is defined by the statute.[160] But, as we stated above, this parental custody dispute does not qualify as a "child custody proceeding" under ICWA. Thus, ICWA's full faith and credit provision does not apply in this case.

Other than ICWA, no federal or state law suggests that courts should grant full faith and credit to tribal court judgments. The full faith and credit provision of the federal constitution applies only to states.[161] As one federal court recently concluded, nothing in the Constitution's text or in the debates of the constitutional convention suggests that the framers believed that the clause would apply to tribes.[162]

Further, federal legislation implementing the Constitution's Full Faith and Credit Clause has extended its application only to United States territories and possessions.[163] Because Congress specifically distinguished between territories and possessions and Indian tribes in enacting ICWA's full faith and credit clause, we do not view this legislation as extending the full faith and credit requirement to tribal judgments.[164]

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[160] *See* 25 U.S.C. § 1911(d).

[161] *See* U.S. Const. art. IV, § 1.

[162] *See Wilson v. Marchington*, 127 F.3d 805, 808 (9th Cir. 1997).

[163] *See* 28 U.S.C. § 1738.

[164] ICWA's full faith and credit clause provides that "[t]he United States, every State, every territory or possession of the United States, and *every Indian tribe* shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe. . . . " 25 U.S.C. § 1911(d) (emphasis added). *See also*

Similarly, the UCCJA and the PKPA, which require courts to recognize and enforce certain child custody determinations, apply only to "states."[165] The two statutes define "state" to mean a state, territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.[166] Neither of the statutes' legislative histories contains any evidence suggesting that the laws apply to Indian tribes. Because ICWA's full faith and credit provision reveals that Congress does not view Indian tribes as "states, territories or possessions," the PKPA does not accord full faith and credit to tribal judgments.[167] And in the absence of proof that the Alaska legislature specifically intended the UCCJA to include Indian tribes, we follow the principle of statutory interpretation instructing that all omissions be treated as exclusions.[168] We therefore conclude that the UCCJA does not apply to tribal judgments.[169]

Wilson, 127 F.3d at 809 (reaching the same conclusion after comparing the language in ICWA and § 1738).

[165] *See* 28 U.S.C. § 1738A(a); AS 25.30.120.

[166] *See* 28 U.S.C. § 1738A(b)(8); AS 25.30.909.

[167] *But see In re Larch*, 872 F.2d 66, 68 (4th Cir. 1989) (holding that the PKPA does apply to tribes because tribal court judgments are entitled to full faith and credit under certain circumstances and tribes are similar to states for purposes of sovereignty and jurisdiction). We are unpersuaded by the reasoning of the *Larch* court in light of the contrary evidence we discussed above.

[168] *See* Norman J. Singer, 2A *Sutherland Statutory Construction* § 47.23 (5th ed. 1992).

[169] State courts interpreting their own versions of the UCCJA have reached contrary conclusions regarding the meaning of the term "state." *See, e.g., Martinez v. Superior Court*,

Because no federal or state law applies the full faith and credit requirement to tribal court decisions, we turn to consideration of the comity doctrine.

2. Comity

Comity is the principle that "the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect."[170] The comity doctrine governs the recognition afforded by courts in the United States to judgments of foreign nations.[171] Comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."[172] Although Indian tribes, as domestic dependent nations, differ from foreign countries, we agree with the Ninth Circuit that comity affords the best "analytical framework for recognizing tribal judgments."[173] Numerous state courts have reached the

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731 P.2d 1244, 1247 (Ariz.App.1987) (holding that an Indian tribe qualifies as a territory of the United States and thus is a state for purposes of the UCCJA); *Sengstock v. San Carlos Apache Tribe*, 477 N.W.2d 310, 314 (Wis.App.1991) (holding that the term "state" does not include an Indian tribe).

[170] *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 695 (Ariz.App.1977).

[171] *See Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

[172] *Id.* at 163-64.

[173] *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997).

same conclusion.[174] We therefore hold that, as a general rule, our courts should respect tribal court decisions under the comity doctrine.[175]

In certain limited circumstances, however, state recognition of tribal judgments may be inappropriate. We conclude, as did the Ninth Circuit, that our courts should refrain from enforcing tribal court judgments if the tribal court lacked personal or subject matter jurisdiction.[176] A requirement that a tribal court possess personal jurisdiction over litigants appearing before it ensures that the tribal court will not be called upon to adjudicate the disputes of parents and children who live far from their tribal villages and have little or no contact with those villages.

We also agree with the Ninth Circuit that state courts should afford no comity to proceedings in which any litigant is denied due process.[177] In deciding whether tribal court proceedings complied with due process, courts should consider whether the parties received notice of the proceedings and whether they were granted a full and fair opportunity to be heard before an impartial

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[174] *See, e.g., Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.*, 462 N.W.2d 164, 167-68 (N.D.1990); *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D.1985); *Custody of Sengstock v. San Carlos Apache Tribe*, 477 N.W.2d 310 (Wis.App.1991).

[175] *See Wilson*, 127 F.3d at 809.

[176] *See id.* at 810 (establishing these factors as guidelines for the federal courts after reviewing the *Hilton* decision, the Restatement (Third) of Foreign Relations Law, and principles of Indian law).

[177] *See id.*

tribunal that conducted the proceedings in a regular fashion.[178] An indication that the judiciary was dominated by the opposing litigant would suggest that due process had been violated.[179]

But this due process analysis in no way requires tribes to use procedures identical to ours in their courts. The comity analysis is not an invitation for our courts to deny recognition to tribal judgments based on paternalistic notions of proper procedure.[180] Instead, in deciding whether a party was denied due process, superior courts should strive to respect the cultural differences that influence tribal jurisprudence, as well as to recognize the practical limits experienced by smaller court systems.[181]

Additionally, superior courts should not deny recognition to tribal judgments simply because they disagree with the outcome reached by the tribal judge or because

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[178] *See Hilton*, 159 U.S. at 202-03.

[179] *See* Restatement (Third) of Foreign Relations Law, § 482 cmt. b (1986).

[180] *See Wilson*, 127 F.3d at 811.

[181] Relying on the Restatement (Third) of Foreign Relations Law, the Ninth Circuit also held that federal courts have the discretion to deny recognition to a tribal judgment if (i) the judgment was obtained by fraud; (ii) the judgment conflicts with another final judgment that is entitled to recognition; (iii) the judgment is inconsistent with the parties' contractual choice of forum; or (iv) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition is sought. *See Wilson*, 127 F.3d at 810. Because the facts of this case do not implicate any of these discretionary factors, we do not decide the extent to which our state courts could also, in their discretion, deny recognition to tribal decisions based on them.

they conclude that they could better resolve the dispute at issue.[182] Thus, suggesting – as the superior court did in this case – that state jurisdiction was proper because "significant expertise will be required to resolve this difficult dispute," has no place in a comity analysis.

Although the comity analysis is not an invitation for superior courts to disregard tribal decisions with which they substantively disagree, the comity analysis, when properly applied, does allow state courts to refuse to enforce a tribal order that "is against the public policy of the United States or the forum state in which recognition is sought."[183] This aspect of the comity analysis should lay to rest the dissent's concern that our decision today will open the floodgates to tribal decisions that are *fundamentally* inconsistent with the public policies underlying Alaska law.[184] But we would ignore the fundamental meaning of sovereignty and insult tribal systems of justice to reason that because tribal law is different it is inferior.[185]

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[182] *See Hilton*, 159 U.S. at 202-03.

[183] *Wilson*, 127 F.3d at 810.

[184] *See* Dissent at 151-54.

[185] The dissent's concerns about the race to the courthouse appear to be overstated and speculative. To view application of tribal law as merely an attempt to circumvent state laws such as Rule 90.3's child support guidelines is essentially to argue that tribal courts are inadequate, a conclusion soundly rejected by federal laws such as ICWA.

3. Applying the comity doctrine in this case

Mr. Baker argues that the superior court should decline to recognize Judge Titus's decision under the comity doctrine for two reasons. First, he contends that because his children are members of Mentasta Village, rather than Northway Village, the tribal court lacked subject matter jurisdiction over the dispute. Second, he maintains that Northway's tribal court system does not comport with due process because it does not provide appellate procedures.

The superior court never had the opportunity to address these arguments through the framework of the comity doctrine as we have outlined it above. Further, we are unable to resolve these claims because the record on appeal contains no information about the tribal membership of the children or the review procedures available in the Northway Tribal Court. We therefore remand to the superior court to allow it to consider Mr. Baker's claims in its application of the comity doctrine.

We would, however, like to provide the superior court with guidance in resolving these claims. First, although this is not an ICWA case, we conclude that ICWA provides the most appropriate test for deciding when a tribal court has subject matter jurisdiction over a particular custody dispute. Under ICWA, the relevant factor is the *child's* tribe.[186] Thus, we agree with Mr. Baker that the Northway court had jurisdiction over this case

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[186] *See, e.g.*, 25 U.S.C. § 1903(5).

only if the children are members or are eligible for membership in the village. In determining the children's membership status, the superior court should apply tribal law.[187]

Second, we do not decide in this appeal whether due process requires tribal courts to provide an appellate or review process. The parties have not fully briefed this issue, and we suspect that conflicting authority exists. Although the Restatement of Foreign Relations Law suggests that *foreign* courts must provide access to review in order to comport with due process,[188] the Supreme Court has held that due process does not require *state* court systems to provide an appellate system.[189] If the superior court finds on remand that Northway Village does not have an appeal or review system, it will need to determine, after detailed briefing, whether the absence of such a system violates due process.[190]

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[187] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (noting that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community").

[188] *See* Restatement (Third) of Foreign Relations Law, § 482 cmt. b (1986).

[189] *See, e.g., M.L.B. v. S.L.J.*, 117 S.Ct. 555, 560 (1996).

[190] We recognize that Ms. John considers the tribal court's order to have been merely temporary, and therefore believes that the issue posed is whether state courts should be able to interfere in *pending* tribal court proceedings. It is unclear to us from the record whether Judge Titus considered her order to be temporary or final. In the state system, superior courts regularly issue custody orders that are deemed final and appealable even though the orders provide that custody will be re-examined when a child reaches school age. *See, e.g., West v. Lawson*, 951

IV. CONCLUSION

Tribal courts in Alaska have jurisdiction to adjudicate custody disputes involving tribal members. This jurisdiction is concurrent with that of the state courts. We therefore REVERSE and REMAND to the superior court to determine whether the tribal court's resolution of the custody dispute between Ms. John and Mr. Baker should be recognized under the doctrine of comity.

MATTHEWS, Chief Justice, joined by COMPTON, Justice, dissenting.

P.2d 1200, 1201-02 (Alaska 1998). We therefore treat the tribal order as final for purposes of our comity analysis.

But we note that the result in this case would be the same regardless of whether the tribal order was temporary or final. Although the UCCJA and the PKPA do not apply to tribal court orders, the policy rationale underlying these acts is instructive. Both the UCCJA and the PKPA were enacted in part to prevent litigation of the same custody dispute in separate jurisdictions. *See* 28 U.S.C. § 1738A; AS 25.30.010, Historical and Statutory Notes. Each of the statutes includes a provision instructing state courts to refrain from exercising jurisdiction over a custody dispute that is already being litigated in another state. *See* 28 U.S.C. § 1738A(g); AS 25.30.050. In fact, this court has recognized that the UCCJA's prohibition against contemporaneous litigation in multiple forums is so strong that an Alaska court should decline to exercise jurisdiction over a case pending in another state's court even if it is unclear that the other state has subject matter jurisdiction. *See Rexford v. Rexford*, 631 P.2d 475, 479 (Alaska 1980) (citing UCCJA Prefatory Note, 9 Uniform Laws Annotated at 116-18). Applying the policy conclusions embodied in these acts, we believe that superior courts should refrain from interfering in pending tribal court proceedings absent unusual circumstances. Once a tribal court has reached a final decision, the comity doctrine will determine the decision's enforceability in state court.

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I. Introduction

Does inherent tribal jurisdiction over custody cases extend beyond Indian country? The majority answers "yes," concluding that tribal sovereignty prevails unless Congress provides otherwise. My answer is "no." Under established principles of federal Indian law, state law governs outside of Indian country unless Congress provides otherwise, and it has not so provided. Moreover, the United States Supreme Court has twice held that inherent tribal jurisdiction over custody applies only to cases arising within Indian country.

Today's opinion changes Alaska society. Alaska law no longer applies to every Alaskan. The doors of Alaska's courts will no longer be open to all Alaskans. More than one-sixth of Alaskan children, [1] regardless of where they reside, will be subject to the laws of one of 226 village tribal organizations. More than one-sixth of Alaskan adults, [2] regardless of where they reside, will be subject to the domestic relations laws of one of 226 village tribal organizations. These laws, written or unwritten, may be different from the laws of the state, indeed they may conflict with the laws of the state. But their reach will be

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[1] Of Alaska's estimated 1998 population of 621,400, 104,085 are Native Alaskans. *See* Alaska Population Overview: 1998 Estimates, Population Estimate by Race and Ethnicity, 1 (Alaska Dep't of Labor). In addition, Department of Labor estimates indicate that more than 30,000 Native Alaskan Indians, Eskimos, and Aleuts resided outside of Alaska in 1990. *See* Alaska Population Overview: 1997 Estimates, Population by Race and Tribal Group, Alaska and U.S. 1980, 1990, Table 1.5, at 23 (Alaska Dep't of Labor).

[2] Population Overview: 1998 Estimates at 1, *supra* note 1.

statewide, and even beyond, governing cases that arise in cities, towns, and villages which may be hundreds of miles from the village whose tribal laws are applied. And the family law cases of more than one out of six Alaskan children and adults now will be subject to adjudication not in the Alaska Court System, but in the tribal courts of one of 226 villages. Some tribal court cases will be decided fairly. Others will not be. But the only remedy Alaskans aggrieved by the application of conflicting laws or unfair decisions will have is to pursue "comity" litigation in the state courts. Relief through this vague doctrine will be uncertain, hard to obtain, and expensive.

Because today's opinion takes a long step away from the Alaska constitutional goal of equal rights under the law and is contrary to federal law, I dissent. Given the importance of this case to the future of Alaska's system of justice, I set forth my views in greater length than is normally required or appropriate in a dissenting opinion.

Today's opinion holds:

(1) That tribal courts have jurisdiction, based on inherent sovereignty, to adjudicate child custody cases which arise outside of Indian country, involving children who are either tribal members or eligible for tribal membership. Such cases involve custody disputes between parents who are tribal members, and between parents when only one parent is a tribal member. The majority also holds that a child's eligibility for tribal membership, taken alone, is a sufficient basis for the assertion of jurisdiction.[3] Thus, any custody dispute involving a child

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[3] Slip Op. at 44-45.

eligible for tribal membership, regardless of the membership status of the adult parties, will fall within the coverage of the opinion.

(2) That when tribal courts decide custody disputes, tribal law controls even where it is inconsistent with state law.[4]

(3) And that Public Law (P.L.) 280,[5] which grants Alaska exclusive jurisdiction of private civil cases arising in Indian country, does not apply to this case.[6]

I disagree with the first two conclusions for reasons developed at length in this dissent.

With respect to the third conclusion, regarding P.L. 280, my observations are as follows. P.L. 280 grants the State of Alaska criminal and civil jurisdiction over cases arising in Indian country. We have held that P.L. 280 grants Alaska exclusive, rather than merely concurrent jurisdiction.[7] The appellant and the amici in this case argue that these holdings are wrong and that tribes have concurrent jurisdiction. Most of their briefing is devoted to this point. P.L. 280, however, focuses on cases arising in Indian country,[8] and the present case does not arise in

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[4] *Id.* at 50.

[5] Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

[6] Slip Op. at 14-17.

[7] *See Native Village of Nenana v. State, Dep't of Health & Soc. Servs.*, 722 P.2d 219, 221 (Alaska 1986); *In re F.P.*, 843 P.2d 1214, 1215-16 (Alaska 1992).

[8] *See* 18 U.S.C. § 1162(a) (1994).

Indian country. Why then the concern with P.L. 280? The appellant and the amici recognize that Congress could not have intended tribes to have more power outside of Indian country than within Indian country. Thus if Alaska has exclusive jurisdiction to decide private custody cases which arise in Indian country, it has, by necessary implication, exclusive jurisdiction to decide private custody cases which arise outside of Indian country.

Since the majority opinion has not overruled our P.L. 280 cases, it might be sufficient for me to observe that one independent reason why the opinion is wrong is that it conflicts with this necessary implication. But in order to fully answer the arguments of the appellant and the amici concerning P.L. 280 I set forth my views on this issue in an addendum to this opinion. There I explain that our previous cases[9] were properly decided, and that P.L. 280 grants Alaska exclusive jurisdiction over private child custody cases arising in Indian country.

II. Historical Setting

In the body of this dissent, I take direct issue with the majority's conclusion that tribal courts have jurisdiction to hear child custody cases not arising in Indian country. To set the context of this case, I begin with a brief statement of the history of Government-Native relations in Alaska. Without such a statement one might assume, based on the majority opinion, that before the Alaska Native Claims Settlement Act (ANCSA) tribes were "adjudicat[ing] domestic disputes between members,"

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[9] *See supra* note 7.

and that I am arguing that Congress in passing ANCSA in 1971 intended to "eradicate tribal court jurisdiction over family law matters."[10] Neither assumption would be correct.

Beginning with the assumption of jurisdiction over Alaska by the United States in 1867, throughout Alaska's history as a territory, and since statehood in 1959, Alaska Natives have always been subject to the same laws as non-Natives.[11] These laws have always been administered only by territorial and state courts open to Native and non-Native alike. Thus Congress, in passing ANCSA in 1971, did not focus on tribal court jurisdiction because tribal courts had played no significant role in Alaska's legal history.

The history of Government-Native relations in Alaska has been recounted in detail in *Native Village of Stevens v. Alaska Management & Planning*,[12] and *Metlakatla Indian Community, Annette Island Reserve v. Egan*.[13] I will refer here mainly to the conclusions that we have drawn

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[10] Slip Op. at 29, 30.

[11] State law has accommodated and recognized certain traditional Native practices. For example, Native traditional, uncontested adoptions have been recognized in state court proceedings. *See, e.g., Calista Corp. v. Mann*, 564 P.2d 53, 61-62 (Alaska 1977).

[12] 757 P.2d 32 (Alaska 1988).

[13] 362 P.2d 901 (Alaska 1961), *rev'd in part*, 369 U.S. 45 (1962) (as to Metlakatla) and *aff'd in part, Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (as to Kake and Angoon). *See also* Donald C. Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 Alaska L. Rev. 353 (1997).

from this history, rather than to the details on which the conclusions are based.

We stated in *Native Village of Stevens* that "the history of the relationship between the federal government and Alaska Natives up to the passage of the Alaska Indian Reorganization Act, 49 Stat. 1250 (1936) indicates that Congress intended that most Alaska Native groups not be treated as sovereigns."[14] "[N]either the Alaska Indian Reorganization Act, nor subsequent Congressional acts have signaled a change from non-sovereign to sovereign status."[15] We supported this conclusion with a detailed examination of court decisions and enactments of Congress and the Territorial Legislature, all indicating that Alaska Natives were governed by general rather than tribal law.[16] We noted that a proviso of the Alaska Indian Reorganization Act of 1936 (IRA) which was applicable to most Alaska Native groups explicitly stated that they had not been recognized as tribes.[17] We reiterated the following points by quoting from our earlier *Metlakatla* opinion:

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[14] 757 P.2d at 34.

[15] *Id.*

[16] *Id.* at 34-41.

[17] *Id.* at 40. The proviso stated:

> PROVIDED, That groups of Indians in Alaska not recognized prior to May 1, 1936 as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district, may organize to adopt constitutions and by-laws and to receive charters of incorporation and federal loans under [sections of the Indian Reorganization Act of 1934].

Id. at 39-40.

> The United States has never entered into any treaty or similar type agreement with any group of Indians in Alaska. None of the Indians of appellant communities have ever been exempt from taxation by the Territory or State of Alaska. Crimes committed by Indians in Alaska have always been punished by the territorial and state courts. . . . There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law. No Indian tribe, independent nation or power has been recognized in Alaska.[18]

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[18] *Id.* at 35-36 (citations omitted). As we observed in *Native Village of Stevens*, since *Metlakatla* was reversed with respect to Metlakatla and affirmed as to Kake and Angoon, the statement that no tribes had been recognized in Alaska was inaccurate because, as the Supreme Court held, the Metlakatlans had received Congressional recognition. *Id.* at 36. We noted that "in all other respects, however, the legal conclusions in *Metlakatla* are accurate." *Id.* The Supreme Court in deciding *Metlakatla* made a number of statements concerning Government-Native relations in Alaska consistent with the views we expressed, including:

> The Indians of southeastern Alaska, who have very substantially adopted and been adopted by the white man's civilization, were never in the hostile and isolated position of many tribes in other States. As early as 1886 a federal judge, holding Alaskan Indians subject to the Thirteenth Amendment, *denied that the principle of Indian national sovereignty* enunciated in *Worcester v. Georgia* 6 Pet. 515, 8 L.Ed. 483, *applied to them. In re Sah Quah*, 31 F. 327 (D. Alaska [1886]). . . . Alaskan Indians are now voting citizens, some of whom occupy prominent public office in the state government. Metlakatlans, the State tells us, have always paid state taxes, in contrast to the practice described and prescribed for other reservations

We also noted in *Native Village of Stevens* that a section of the Alaska IRA authorized the Secretary of the Interior to designate as reservations areas of land which had previously been reserved by executive order for the use and occupancy of Alaska Natives or which were actually occupied by them.[19] Some reservations were so designated.[20] These reservations, and the earlier reserves that were not designated as reservations, clearly meet the definition of "Indian country" codified in 1948 in 18 U.S.C. 1151(b) as "dependent Indian communities." But they were not thought to be areas beyond the reach of state law.[21]

> *. . . and it has always been assumed that the reservation is subject to state laws.*

Metlakatla, 369 U.S. at 50-51 (emphasis added) (citations omitted).

[19] 757 P.2d at 40.

[20] Ten reservations were created. *See* Mitchell, *supra* note 13 at 366-371.

[21] *See* Letter from Roger Ernst, Asst. Sec'y of the Interior, to Hon. Emanuel Celler, Chairman, Comm. on the Judiciary, House of Representatives (Feb. 25, 1958), S. Rep. No. 58-1872, at 3 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3348-49 ("[T]he general understanding had been that the many native villages in Alaska were not Indian country, and it had been the general practice for Territorial officers to apply Territorial law in the native villages."); Mitchell, *supra* note 13 at 372-374. This is not surprising since the "dependent Indian communities" formulation is taken from the 1938 case of *United States v. McGowan*, 302 U.S. 535 (1938), in which the Court held that a small parcel in Nevada which had been purchased by the federal government for needy Indians was Indian country but that this designation did not mean that state jurisdiction was retracted. The Court stated that its finding of Indian country

This assumption was challenged in 1957 in the case of *In re McCord*.[22] That case involved the prosecution for statutory rape of two Natives who resided, and committed their alleged offenses, on a reserve created by executive order encompassing the village of Tyonek. Tyonek had been issued a constitution under the Alaska IRA. The defendants contended that Tyonek was Indian country and was thus beyond the reach of the laws of the Territory of Alaska and that the federal act extending certain federal crimes to Indian country did not apply to statutory rape.[23] Territorial District Court Judge McCarrey

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> does not deprive the state of Nevada of its sovereignty over the area in question. The federal government does not assert exclusive jurisdiction within the colony. Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments.

Id. at 539. This conception of a state's power in "dependent Indian communities" has changed over the years. The "state law applies except where preempted" approach of *McGowan* has evolved into a general rule expressed most recently by the United States Supreme Court in terms of "primary jurisdiction" in Indian country "rest[ing] with the Federal Government and the Indian tribe . . . , and not with the States". *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 952 n.1 (1998) (citation omitted). Joseph D. Matal, *A Revisionist History of Indian Country*, 14 Alaska L. Rev. 283, 314-38 (1997), describes this change in detail.

[22] 151 F.Supp. 132 (D. Alaska 1957).

[23] *Id.* at 133-34.

accepted these arguments and dismissed the charges against the defendants.[24]

While the *McCord* decision disturbed conventional assumptions and threatened to leave a law enforcement void at least on those reserves which were occupied by villages which had IRA constitutions, its immediate effects were short-lived. Within a year Congress had added the Territory of Alaska to the list of states governed by P.L. 280.[25] This action, taken in response to the *McCord* decision, extended the criminal and civil laws of the territory to Indian country under the administration of the territorial courts.[26]

This was the historical setting in 1971 when ANCSA was passed revoking all reservations except Metlakatla. Native sovereignty issues, tribal law, and tribal court jurisdiction were not within the scope of ANCSA.[27]

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[24] *Id.* at 136. The Assistant U.S. Attorney argued, consistent with the dominant assumptions which I have described, that Tyonek was not Indian country and "that Alaska natives are in a different position as concerns the jurisdiction of criminal offenses than the Indians in the United States proper." *Id.* at 134.

[25] Act of August 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

[26] *See* Addendum, *infra* at 165-66.

[27] As Senator Ted Stevens, one of the prime architects of ANCSA, stated in 1986, when sovereignty was an issue: "ANCSA was and is a land settlement. It did not terminate the special relationship between Alaska Natives from the Federal Government or resolve any questions concerning the governmental status, if any, of various Native groups. There's not one reference to sovereignty in ANCSA or in the 1971 Conference report." *To Amend the Alaska Native Claims Settlement*

Alaska law was thought to apply to all Alaskans, both Native and non-Native, and the cases of all Alaskans were decided in Alaska courts.[28] The assumption of Congress and the Department of the Interior in 1971 was that P.L. 280 granted exclusive jurisdiction to the state.[29] And Alaska Native villages had not received formal recognition as tribes.

But three developments of considerable legal significance took place after the passage of ANCSA. First, in the mid-1970's the Department of Interior reversed its field and decided P.L. 280 was a grant of concurrent rather than exclusive jurisdiction to the states.[30] This view was adopted by the Ninth Circuit in *Native Village of Venetie I.R.A. Council v. Alaska (Venetie IRA).*[31]

Second, the Interior Department in 1993 through Assistant Secretary Deer administratively recognized 226 Alaska Native villages as sovereign tribes.[32]

And third, the Ninth Circuit in *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal*

Act: Hearings on S. 2065 before the Subcomm. on Public Lands of the Senate Comm. on Energy and Natural Resources, 99th Cong., 2d Sess. 329 (1986).

[28] *See Native Village of Stevens v. Alaska Management & Planning,* 757 P.2d 32 (Alaska 1988) (discussing historical setting).

[29] *See* Addendum, *infra* at 172-75, 178-80.

[30] *See id.* at 180.

[31] 944 F.2d 548 (9th Cir. 1991).

[32] *See* 58 Fed. Reg. 54, 364-69 (1993).

Government (Venetie I),[33] ruled that at least some land conveyed under ANCSA qualified as Indian country.

The conjunction of these events promised to have significant and potentially enormous consequences. More than forty-four million acres (an area about the size of the State of Washington) were conveyed under ANCSA. Since virtually every Native village recognized as sovereign by Secretary Deer received an ANCSA conveyance, Alaska might have contained 226 semi-autonomous nations. State functions spanning a broad spectrum of criminal and civil laws might have been transferred to the villages within these enclaves.

This then was the setting in 1998 when the United States Supreme Court decided *Alaska v. Native Village of Venetie Tribal Government (Venetie II)*.[34] In that case the tribal government sought to impose about $161,000 in taxes covering commercial activities within the tribal village on a contractor building a state school on tribal lands transferred under ANCSA.[35] The Ninth Circuit had noted that the ultimate question – "whether Venetie has the authority to tax activities occurring within its territory – turns on whether Venetie occupies Indian country".[36] The circuit court had concluded that Venetie's ANCSA lands were Indian country.[37]

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[33] 101 F.3d 1286 (9th Cir. 1996).

[34] 118 S. Ct. 948 (1998).

[35] *Id.* at 951.

[36] *Venetie I*, 101 F.3d at 1290.

[37] *Id.* at 1302.

The United States Supreme Court reversed, holding that a tribe's ANCSA lands are not Indian country.[38] Referring to the "dependent Indian communities" definition in 18 U.S.C. § 1151(b), the Court held that a two-part test applied. The lands must have been set aside by the federal government for the use of Indians as Indian land, and the lands must be under continuing federal superintendence.[39] Neither part of the test was met with respect to ANCSA lands.[40] ANCSA revoked all reservations in Alaska except Metlakatla and transferred lands to private state-chartered Native corporations without restraints on alienation. And instead of continuing federal superintendence, one objective of ANCSA was to avoid a "lengthy wardship or trusteeship."[41]

The Supreme Court's decision in *Venetie II* meant that there would not be numerous reservation-like enclaves in Alaska. But in some ways the majority's decision today will have broader consequences than an affirmance of the Ninth Circuit's *Venetie I* decision would have had. If there were Indian country enclaves, tribal jurisdiction would be confined to the enclaves. But without the geographical limits of enclaves, under today's decision tribal jurisdiction extends statewide, and beyond. It follows tribal members, children eligible for membership, and their parents wherever they reside.

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[38] *Venetie II*, 118 S. Ct. at 955-56.

[39] *Id.* at 954 & n.5.

[40] *Id.* at 955.

[41] *Id.* at 955-56.

III. How This Case Should Be Decided

Before turning to a critique of the majority's reasoning I will state in affirmative form how I think this case should be decided. Appellant claims, and the majority concludes, that Northway has inherent sovereignty to regulate domestic relations among members.[42] Tribes unquestionably have certain powers which derive from inherent sovereignty. For example, as the majority notes, tribes have the power to regulate the conduct of members through criminal laws, they have the power to determine their own membership, they have power over the domestic relations of their members, they have the power to prescribe and enforce rules of inheritance for their members, and they have the power to tax.[43] But do all, or any, of these powers extend beyond Indian country? Specifically, the question in this case is: Does the adjudicatory power to decide the custody disputes of parents whose children are tribal members apply to cases not arising in Indian country?

This is a question of federal law. But there is no need to search the reports of the lower federal courts for an answer. The United States Supreme Court has answered it, twice. The answer is that a tribe's inherent power to adjudicate the custody cases of tribal children does not extend to cases not arising in Indian country.

In *DeCoteau v. District County Court*,[44] the Court recognized that tribal court jurisdiction would not apply to

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[42] *See* Slip Op. at 17-18.

[43] *Id.* at 34-35.

[44] 420 U.S. 425 (1975).

custody proceedings involving Indian children not residing in Indian country. Because the reservation where the parent and children resided had been terminated, the state court rather than the tribal court had jurisdiction.[45]

In *Fisher v. District Court*,[46] the Court upheld tribal court jurisdiction over children in a dispute concerning whether a state court or a tribal court had jurisdiction, because "all parties resided on the reservation at all relevant times."[47] The court stated that as between state and tribal courts "it is appropriate to predicate jurisdiction on the residence of the litigants."[48]

Thus *DeCoteau* and *Fisher* unequivocally teach that a tribe's inherent power over child custody cases is limited to cases arising in Indian country.

It is no coincidence that the Supreme Court in making the allocative decision involved in *Venetie II* cited Footnote 2 of *DeCoteau*. The Court in *Venetie II* stated: "Although this definition [of Indian country] by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction such as the one at issue here. *See DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975)."[49] Footnote 2 of *DeCoteau*, cited by the Court in *Venetie II*, supplies the complete answer to the present case:

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[45] *Id.* at 427-28 & n.2.

[46] 424 U.S. 382 (1976).

[47] *Id.* at 389 n.14.

[48] *Id.*

[49] *Venetie II*, 118 S. Ct. at 952.

> If the lands in question are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government. . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished. . . . While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction."[50]

DeCoteau and *Fisher* are specific examples of what I refer to as the "allocative principle" – the basic principle allocating government responsibilities as between states and tribes. The allocative principle holds that within Indian country state laws are generally not applicable to tribal Indians unless Congress has explicitly provided for their application, while outside of Indian country tribal authority generally does not apply unless Congress has clearly expressed that tribal authority should apply.[51] Congress has not provided for tribal jurisdiction in child custody disputes between the parents of Indian children arising outside of Indian country. Therefore based on the general allocative principle, as well as on its specific application to child custody cases in *DeCoteau* and *Fisher*, the Northway tribal court does not have jurisdiction in this case.

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[50] *DeCoteau*, 420 U.S. at 427 n.2.

[51] *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). I explain this principle at some length in Part V of this dissent.

IV. Summary of the Majority's Reasoning

The rationale of the majority can be expressed in two syllogisms. The first is as follows:

(1) Tribal sovereignty exists (apparently wherever it is asserted) unless Congress has expressly and unambiguously divested the tribe of sovereignty in the type of case at issue.[52]

(2) Congress has not expressly and unambiguously divested Alaska tribes of child custody jurisdiction in cases arising outside of Indian country.[53]

(3) Therefore Alaska tribes have custody jurisdiction in cases arising outside of Indian country.

As support for the conclusion reached by this syllogism and as an independent but related rationale the majority also relies on the following second syllogism:

(1) Through the Tribe List Act and Tribal Justice Act, Congress has ratified the Secretary of the Interior's recognition of Alaska tribes as sovereigns, and as sovereigns, they have inherent authority to establish their own forms of government including tribal justice systems.[54]

(2) Unless tribes that do not occupy Indian country have "inherent powers of self-governance," including the power to adjudicate child custody disputes, their sovereignty would be "virtually meaningless."[55]

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[52] Slip Op. at 23-25, 27.

[53] *Id.* at 28-32.

[54] *Id.* at 29, 31-32.

[55] *Id.* at 29-30.

(3) As Congress did not intend tribal sovereignty to be virtually meaningless, it must have empowered tribes that do not occupy Indian country to exercise inherent powers of self-governance, including child custody jurisdiction, outside of Indian country.[56]

These syllogisms are flawed. In particular the first premise of the first syllogism is wrong because it ignores the basic principle for the allocation of state and tribal functions. Outside of Indian country state laws apply to Indians unless Congress explicitly provides otherwise. Thus, outside of Indian country the premise should not be that tribal sovereignty applies unless Congress provides otherwise, but that state sovereignty applies unless Congress provides otherwise.

The second syllogism is wrong in several respects. In particular, the second premise treats all the inherent tribal powers of self-government alike. In fact, some inherent powers might be effective outside of Indian country, but others definitely are not. Supreme Court case law is clear that, for example, the power to regulate the conduct of tribal members toward each other through the criminal law does not extend beyond Indian country.[57] Equally clear is Supreme Court case law that the power to adjudicate child custody cases does not extend beyond Indian country.

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[56] *Id.* at 29-32.

[57] *See Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

Further, the second premise of the second syllogism is wrong in asserting that sovereignty would be "virtually meaningless" unless tribes which do not occupy Indian country have all the inherent powers of self-government. Indian country is an important limiting factor, but tribes without it still have the inherent power to determine their own forms of organization and membership.[58] Further, tribes have such powers as are delegated them by Congress. Tribal powers under the Indian Child Welfare Act are an important example of delegated powers that involve the need to use tribal justice systems. Other powers may be delegated in the future, as needed in the judgment of Congress. Tribes outside of Indian country are also eligible for special programs and services provided to Indians by the federal government, many of which involve tribal administration of federal grants. Also, such tribes have sovereign immunity. Thus tribal sovereignty for tribes that do not occupy Indian country is not meaningless.

Finally, the conclusion of the second syllogism that Congress must have wanted tribes that do not occupy Indian country to exercise all the powers of inherent self-government outside of Indian country is demonstrably wrong, for Congress's intent was to treat all tribes equally, and Indian country is a limiting factor on the

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[58] *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *see also* the Tribal Justice Act, 25 U.S.C. § 3601(4) (1994), which states that "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems."

authority of all tribes.[59] Some tribes outside of Alaska also have lost most of their Indian country, and occupy, like Northway, only scattered allotments – yet their authority is limited by the allocative principle. The tribe in *DeCoteau* is one example.

V. The Allocative Principle of State and Tribal Power

A. The Allocative Principle Is a Fundamental Component of American Indian Law

Despite the complexities of the numerous Supreme Court decisions addressing the extent of tribal power with respect to the states, most of these cases either explicitly or implicitly address two issues: (1) whether the litigants and the activity giving rise to the dispute are based in Indian country, and (2) whether there is an act of Congress which expressly supports the particular exercise of state or tribal power.

These two issues are important because, as the Supreme Court stated in *Bryan v. Itasca County,* the general rule is that "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply."[60] By contrast, outside of Indian country the "general rule" is that tribal authority does not apply, unless there is a clear congressional expression that it should. As the Supreme Court stated in *Oklahoma Tax Commission v. Chickasaw Nation,* " 'express federal law to the contrary'

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[59] *See infra* Dissent Part VI.

[60] 426 U.S. 373, 376 n.2 (1976) (quoting *McClanahan v. State Tax Comm'n,* 411 U.S. 164, 170-71 (1973)).

overrides *the general rule* that 'Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.' "[61]

In *Mescalero Apache Tribe v. Jones*,[62] the Supreme Court made it clear that this is a firmly established principle of American Indian law that dates back to the 19th century:

> [T]ribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake [v. Egan]*, 369 U.S. [60, 75 (1962)]. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. *See, e.g., Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968); *Organized Village of Kake, supra*, 369 U.S. at 75-76; *Tulee v. Washington*, 315 U.S. 681, 683 (1942); *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928); *Ward v. Race Horse*, 163 U.S. 504 (1896).[63]

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[61] 515 U.S. 450, 465 (1995) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)) (emphasis added).

[62] 411 U.S. 145 (1973).

[63] *Id.* at 148-49. Numerous other Supreme Court decisions after *Mescalero* have continued to recognize this principle. *See, e.g., Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 118 S. Ct. 1700, 1703 (1998) ("We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. . . . To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit."); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136,

Mescalero Apache Tribe also leaves little doubt that the "principle" it describes is a broad one: "That principle is as relevant to a State's tax laws as it is to state criminal laws, *see Ward v. Race Horse, supra,* at 516, and applies as much to tribal ski resorts as it does to fishing enterprises. *See Organized Village of Kake, supra.*"[64]

Secondary sources have also recognized the existence and importance of the allocative principle. For example, the *American Indian Law Deskbook,* which is a treatise compiled by the Conference of Western Attorneys General, states:

> Determining the presence of Indian country is the benchmark for approaching *the allocation* of federal, tribal, and state authority with respect to Indians and Indian lands. . . . [T]he Supreme Court has employed [the Indian country definition] to determine the geographical reach of the special Indian law rules governing preemption of state law in civil contexts. Thus the "Indian country" definition is relevant to virtually every aspect of Indian law unless displaced by another statutory formulation of geographical coverage.[65]

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144 n.11 (1980) (quoting *Mescalero,* 411 U.S. at 148-49); *Bryan,* 426 U.S. at 376 n.2 ("Of course, this pre-emption model [favoring tribal authority] *usually yields different conclusions* as to the application of state laws to tribal Indians who have left or never inhabited federally established reservations.") (emphasis added).

[64] *Mescalero Apache Tribe,* 411 U.S. at 149.

[65] *American Indian Law Deskbook,* 36-37 (Joseph P. Mazurek et al. eds., 2d. ed., 1998) (internal citations and quotations omitted) (emphasis added); *see also Ahboah v. Housing Auth. of*

The discussion of "Preemption in Indian Law" in *Federal Indian Law*,[66] is also an analysis of the allocative principle. Most of the discussion concerns the "within Indian country" aspect of the principle, because this aspect has received more attention recently. As to the "outside of Indian country" aspect of the allocative principle, this text states:

> Preemption can occur in off-reservation contexts also, but the approach is different: state law applies to off-reservation Indian activities unless there is "express federal law to the contrary." Examples of such express laws are treaties reserving off-reservation fishing rights.[67]

Thus, the Supreme Court and Indian law scholars and practitioners have consistently recognized the allocative principle and its centrality in federal Indian law jurisprudence.

In its recent *Venetie II* decision, the United States Supreme Court once again emphasized the allocative principle, this time in the context of Alaska Natives.

Kiowa Tribe, 660 P.2d 625, 627 (Okla. 1983), which is cited by the *Deskbook* in the above discussion for the following statement: "*the touchstone for allocating authority* among the various governments has been the concept of 'Indian Country.' " *Deskbook* at 36 n.46 (emphasis added); *and see* the State of Alaska's Brief in *Venetie II*, 1997 WL 523883 at 18 (citations omitted) ("Indian country is the jurisdictional touchstone for delineating federal, state, and tribal authority over Indian-occupied lands.").

[66] David H. Getches & Charles F. Wilkinson, *Federal Indian Law* 331-36 (2d ed. 1986).

[67] *Id.*, note at 333.

Despite the fact that the power to tax is one of a tribe's inherent powers of self-government,[68] the Supreme Court applied the allocative principle and held that the Venetie tribe did not have the power to levy the tax in question because it was being imposed on an activity on tribal lands outside of Indian country.[69] The Court expressed the allocative principle by first citing Footnote 2 of *DeCoteau*.[70] The Court then stated: "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998)."[71] The part of the *Yankton Sioux* opinion cited by the *Venetie II* Court states: "If the divestiture of Indian property . . . effected a diminishment of Indian territory, then the ceded lands no longer constitute 'Indian country' as defined by 18 U.S.C.

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[68] *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government.").

[69] 118 S. Ct. 948, 954-56 (1998).

[70] *Id.* at 952. Because of its importance to this discussion I quote this footnote once again.

> If the lands in question are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government. . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished. . . . "

DeCoteau, 420 U.S. at 427 n.2.

[71] *Venetie II*, 118 S. Ct. at 952 n.1.

§ 1151(a) and the State now has primary jurisdiction over them."[72]

This general rule, with its presumption in favor of state authority outside of Indian country, clearly applies to the present case. The critical issue here, as in *Venetie II* and *DeCoteau*, is whether a tribe can exercise one of its inherent powers outside of Indian country. Nevertheless, the majority ignores this bedrock principle of Indian law jurisprudence in deciding the issue.

Instead of beginning with the premise that state law applies and asking, as the allocative principle requires in cases arising outside of Indian country, whether there is an act of Congress which is in conflict with the assertion of state authority, the majority reverses the principle and begins with the premise that tribal authority applies and asks whether Congress has expressly divested the tribe of jurisdiction in this situation.[73] The majority does this by claiming that *Montana v. United States*[74] "reconciled" the allocative principle, as stated in *Mescalero*, with "the general rule that tribal sovereignty exists unless specifically divested" by Congress.[75] The implication is that the *Montana* Court somehow changed the meaning and scope of

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[72] *Yankton Sioux Tribe*, 522 U.S. 329, ___; 118 S.Ct. 789, 793 (1998).

[73] See the first premise of the majority's first syllogism *supra* Part IV of this dissent and the majority opinion at 23-25, 27.

[74] 450 U.S. 544 (1981).

[75] Slip Op. at 26. With respect to this general rule, I offer, I fear repetitively, the following observations: In view of the 1993 recognition by Secretary Deer of the tribal status of Alaska's Native villages, *see supra* text accompanying note 32, the

the allocative principle, and because of this "reconciliation" the majority claims that "the [Supreme] Court has not focused on tribal land as determinative of tribal authority."[76] This reasoning is simply wrong. As recently as 1995, the Supreme Court referred to the allocative principle as a "general rule" of Indian law jurisprudence.[77]

Moreover, contrary to the majority's assertions, *Montana* did not water down what *Mescalero*'s expression of the allocative principle meant.[78] Rather, *Montana* cited *Mescalero* for the proposition that "even on reservations, state laws may be applied unless such application would interfere with reservation self-government."[79] This

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existence of their sovereignty is not in issue. They have the same sovereign powers as recognized tribes in other states. In cases where tribal villages or village members occupy Indian country – allotments or other categories of trust property – Alaska tribes have the same powers as tribes in other P.L. 280 states. Likewise, to the extent that tribal villages or village members do not occupy Indian country, Alaska tribes have the same sovereign power as tribes which have little or no Indian country in other states. In neither case is the existence of tribal sovereignty in question, but in Alaska as in the other states tribal powers are constrained by the absence of Indian country. Thus the question in this case is not whether Northway Village Tribe exists as a sovereign, but whether its inherent sovereign powers extend to child custody cases not arising in Indian country.

[76] Slip Op. at 26.

[77] *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995) (quoting *Mescalero*, 411 U.S. at 148-49).

[78] *See* Slip Op. at 26-27.

[79] *Mescalero*, 411 U.S. at 148. There is no doubt, when analyzing both *Mescalero* and *Montana*, that the quote from *Montana* that the majority uses at page 26 of its opinion

statement adds meaning in favor of state power to the "within Indian country" aspect of the allocative principle, but it does nothing to change the meaning of the allocative principle applied outside of Indian country. This is clear from the text of *Mescalero*, because almost immediately after *Mescalero* makes the statement quoted in *Montana*, the Court goes on to state the "outside of Indian country" portion of the allocative principle: "But tribal activities conducted outside the reservation present different considerations. . . . Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."[80] Thus, contrary to the majority's assertions, *Montana*, a case about tribal power over nonmembers on a reservation, does not change the allocative principle's presumption in favor of state authority outside of Indian country.

As noted, the majority's failure to apply the allocative principle leads the majority to proceed from the wrong premise. This, in turn, leads to the erroneous

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references the above-quoted language in *Mescalero*. *Compare Montana*, 450 U.S. at 564 ("[The] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148") *with Mescalero*, 411 U.S. at 148 ("The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government. . . . ").

[80] *Mescalero*, 411 U.S. at 148-49 (citations omitted).

decision in this case. Despite over 100 years of Supreme Court precedent reflecting the allocative principle, the majority goes so far as to state that "whether [a] tribe is located in Indian country" is not a "key inquiry" in cases delineating the extent of tribal jurisdictional power.[81] Such a statement in view of numerous Supreme Court decisions to the contrary turns a blind eye on controlling legal precedent.

B. The Supreme Court Has Traditionally Viewed Whether or Not a Case Arose in Indian Country as a Threshold Issue

Contrary to the majority's claim, the Supreme Court has not only viewed whether or not a case arose in Indian country as an important inquiry in cases delineating tribal jurisdiction, the Court has traditionally treated such an inquiry as the threshold issue upon which the outcome of the case turns. For example, in *McClanahan* the Court stated: "It may be helpful *to begin* our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use. . . . "[82]

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[81] Slip Op. at 36.

[82] *McClanahan*, 411 U.S. at 167 (emphasis added) (citations omitted); *see also Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 124 (1993) (noting that "[i]t is true that we began our discussion in *McClanahan* by emphasizing that we were not 'dealing with Indians who have left or never inhabited reservations set aside for their exclusive use. . . . ' ").

Also, in *Organized Village of Kake,* a case involving Native Alaskans, the *first* issue the Court addressed was the status of the land upon which the dispute arose: "The situation here differs from that of the Metlakatlans in that neither Kake nor Angoon has been provided with a reservation."[83] Because the tribe did not reside in Indian country, and there existed no "statutory authority under which the Secretary of the Interior might permit [Kake] to operate fish traps contrary to state law," the Court held that Alaska's fishing laws applied to the tribe.[84]

Likewise in *Venetie II* the first, and only, question which the Supreme Court addressed was whether the tribal lands on which the taxed activity took place were within Indian country.[85] Since the answer was "no" the tribe's inherent power to tax could not be exercised.[86]

Similarly, in *DeCoteau* the Supreme Court affirmed state court jurisdiction over Indian children in a custody proceeding because, as the court held, the case arose on land that no longer was Indian country. Jurisdiction was exclusive.[87] In Indian country the state would have no jurisdiction, outside Indian country the tribe would have no jurisdiction.[88] The Supreme Court's introductory language makes it clear that whether or not the land was

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[83] *Organized Village of Kake,* 369 U.S. at 62.

[84] *Id.*

[85] *See* 118 S. Ct. at 951.

[86] *Id.* at 955-56.

[87] *See* 420 U.S. at 427 n.2.

[88] *Id.; see also id.* at 467 (Douglas, J., dissenting).

Indian country was the threshold issue upon which the outcome of the case rested: "We hold, for the reasons that follow, that [Congress] terminated the Lake Traverse Reservation, and that consequently the state courts have jurisdiction."[89]

C. Indian Country as a Jurisdictional Concept Encompasses Tribal Power over Both Tribal Lands and Members

As the above discussion of the allocative principle makes clear, Indian country as a jurisdictional concept encompasses tribal power over both tribal lands and tribal members. Remarkably, the majority takes issue with this fundamental and settled principle of Indian law. The majority states that the Supreme Court in *Venetie II* "makes clear that any allocative significance that exists in the concept of Indian country pertains to a tribe's territorial power over its land, not its members."[90] The majority comes to this conclusion, which is at odds with over 100 years of Supreme Court precedent,[91] by reasoning that because the Supreme Court in *Venetie II* "not[ed] that tribes have 'primary jurisdiction over *land* that is Indian country' but [said] nothing about jurisdiction over members" there is no "allocative significance . . . in the concept of Indian country" with regard to questions of tribal

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[89] *Id.* at 427-28 (emphasis added).

[90] Op. at 757.

[91] See supra Dissent Parts v.A & v.B.

jurisdiction over tribal members.[92] This conclusion has no basis in Indian law jurisprudence.

The Supreme Court in *Venetie II* "[said] nothing about jurisdiction over members"[93] for the simple reason that "jurisdiction over members" was not an issue in *Venetie II*. Whether Venetie's ANCSA-granted lands were Indian country and whether Venetie could exercise its inherent power to tax nonmembers on its lands located outside of Indian country were the issues in that case. Nevertheless, according to the majority's logic, if a specific Supreme Court decision, for example, said that all federal courts must obey Supreme Court precedent, the majority would reason that state courts could ignore Supreme Court precedent because the Court's decision did not mention state courts. The Supreme Court's silence on a subject that is not at issue in a case is just that – silence – not some kind of implied legal pronouncement. The Supreme Court itself has recently criticized the type of faulty reasoning in which the majority engages.[94]

Moreover, numerous Supreme Court cases reveal just how mistaken the majority's conclusion is that Indian

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[92] Op. at 39 & n.121.

[93] Id. at n. 121.

[94] *See El Paso Natural Gas Co. v. Neztsosie*, 119 S. Ct. 1430, 1439 (1999) (noting that "[n]ow and then silence is not pregnant" in a case in which the Court reversed the Ninth Circuit for reasoning that tribal court could determine whether it had jurisdiction over putative Price-Anderson actions because although the congressionally mandated jurisdictional scheme of the Price-Anderson Act clearly intended removal as of right to federal courts from state courts, the Act was silent about tribal courts).

country is not relevant to the issue of whether a tribe has jurisdictional power over its own members.[95] In each of these cases, the existence of Indian country was the central factor in determining whether the tribe had jurisdictional authority over its members.

D. The Majority's Decision Is Internally Inconsistent with Regard to the Importance of a Territorial Basis for Tribal Court Jurisdiction

As the above discussion shows, there is substantial Supreme Court authority establishing the allocative principle and the importance of Indian country in delineating state and tribal jurisdictional authority. Because this authority undercuts the basis for the majority's decision, the majority spends much effort arguing that Indian

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[95] *See, e.g., Hagen v. Utah*, 510 U.S. 399 (1994) (Utah courts properly exercised criminal jurisdiction over an Indian who committed a crime – the diminishment of the Uintah Indian Reservation meant that the location where the crime was committed was no longer Indian country); *Solem v. Bartlett*, 465 U.S. 463 (1984) (holding that because the defendant, who was an enrolled member of the Cheyenne River Sioux Tribe, committed a crime on reservation grounds, the state did not have criminal jurisdiction over him); *DeCoteau*, 420 U.S. at 427-28 (holding that because "[Congress] terminated the Lake Traverse Reservation," and because the events giving rise to the child custody dispute arose on these lands, "the state courts have jurisdiction [over an Indian child custody dispute]."); *Organized Village of Kake*, 369 U.S. at 75 ("It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country.").

country is not relevant or needed for tribal court jurisdiction over members.[96]

Ironically, the majority, at the end of its opinion, impliedly acknowledges the need for a territorial and geographical basis for jurisdiction in cases like the present one. In its discussion of comity, the majority states that state courts should not recognize tribal court judgments if the tribal court lacked personal jurisdiction.[97] But personal jurisdiction is an inherently territory-based concept, involving contact with a forum state – a geographical entity.[98] Thus, the majority opinion says that

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[96] *See, e.g.*, Slip Op. at 26 ("the Court has not focused on tribal land as determinative of tribal authority"); Slip Op. at 32-33 (tribes "derive the power to adjudicate internal domestic matters . . . from a source of sovereignty independent of the land they occupy"); Slip Op. at 33 ("the case law does not fairly support the view that the existence of Indian country is an absolute prerequisite to the existence of sovereign tribal power"); Slip Op. at 36 ("[t]he key inquiry . . . is not whether the tribe is located in Indian country"); Slip Op. at 37 ("tribal status itself [without Indian country] includes the power to adjudicate internal child custody disputes").

[97] *Id.* at 54.

[98] For example, in *Parker v. State, Dep't of Revenue, CSED*, 960 P.2d 586, 587-88 (Alaska 1998) (citations omitted, in part), we explained:

> For the exercise of personal jurisdiction over a nonresident defendant to be constitutional, the defendant must have sufficient "minimum contacts" with the forum state so that maintaining a suit in the forum state "does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

the proper exercise of tribal court jurisdiction is not dependent on the territorial concept mandated by federal Indian law, Indian country, but it is dependent on some form of territorial nexus.

The majority does not explain how lower courts should apply its new personal jurisdiction concept. The idea of personal jurisdiction relates to a defendant's contacts with a forum state.[99] In cases involving Indians, the analog to the forum state is Indian country. Today, the

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Jurisdiction is permissible over a nonresident defendant where his contacts with the forum are such that he could reasonably anticipate being haled into court in the forum state. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State. . . .

Puhlman v. Turner, 874 P.2d 291, 293 (Alaska 1994). A nonresident defendant must have fair warning that his activities may foreseeably subject him to jurisdiction in Alaska.

If the defendant's activities in the forum state are "continuous and systematic," the forum may assert "general jurisdiction" over the defendant, and the cause of action need not arise out of the contacts with the forum state. However, where the cause of action arises out of the contacts with the forum state, the court may have "specific jurisdiction," even where the defendant has only one contact with the forum state.

[99] *See supra* note 98.

majority invents a new analog to the state for purposes of personal jurisdiction in Alaska – the tribal village:

> A requirement that a tribal court possess personal jurisdiction over litigants appearing before it ensures that the tribal court will not be called upon to adjudicate the disputes of parents and children who live far from their tribal villages and have little or no contact with those villages.[100]

These assurances that "tribal courts will not be called upon to adjudicate the disputes" of those who live far from tribal villages are illusory, for if a party files a custody suit against another party, Native or non-Native, that defendant must respond no matter where he or she lives, or risk a default judgment in tribal court. The defendant might be able to raise the defense that the tribal court lacked personal jurisdiction but the uncertainty of the meaning of personal jurisdiction in the context of village tribal courts makes that a strategy whose risks may be unacceptably high for many litigants.[101]

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[100] Slip Op. at 54.

[101] Also, the benefit of convenience to Natives in remote villages, noted by the majority at page 47 of its opinion, may prove to be illusory. No decree of a tribal court will be self-executing, just as no decree from another state is enforceable in Alaska without an order from an Alaskan court. Any party who decides not to follow a tribal decree will, therefore, always have the opportunity to raise comity issues in a state court before the tribal decree can be enforced. Thus, after the issues are tried in a tribal court, if a party does not voluntarily comply with the tribal court decree, there must be another proceeding in state court in which the fairness of the tribal court proceeding can be tried. This has the potential to be more time-consuming and expensive than merely proceeding in state court to begin with.

It is anyone's guess how the untested concept of personal jurisdiction premised on tribal villages will play out in our state courts. But it does reveal the foundation upon which the majority's decision rests. Rejecting the need for Indian country as the territorial basis for tribal jurisdiction, the majority in the end substitutes another territorial concept through the doctrine of personal jurisdiction. This is a new path, one not taken by federal Indian law.

VI. Indian Country Is a Prerequisite for the Exercise of Tribal Court Adjudicatory Authority

A. The Supreme Court Has Never Held that a Tribe's Inherent Powers Can Be the Basis for Exercising Tribal Adjudicatory Authority Outside of Indian Country

The United States Supreme Court has never held, as the majority does today, that a tribe's inherent sovereignty, in and of itself, independent of Indian country, can be the basis for tribal adjudicatory authority.[102] The

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[102] It is important to note that all the cases upon which the majority relies to support its ruling are cases that discuss the concept of tribal inherent sovereignty, but do so in the context of disputes that arise in Indian country. *See, e.g., United States v. Wheeler,* 435 U.S. 313 (1978); *Montana v. United States,* 450 U.S. 544 (1981). Thus, the majority attempts to answer the question of whether tribal power extends *beyond* Indian country by relying on cases that involve the exercise of tribal power *in* Indian country. But the absence of Indian country is the critical fact that distinguishes the present case from those relied upon by the majority.

majority acknowledges the absence of case law supporting what it does today, but claims that this dearth of legal precedent results from the fact that "courts have not had occasion to tease apart the ideas of land-based sovereignty and membership sovereignty."[103]

This is an erroneous reading of Supreme Court Indian law jurisprudence, for "teasing apart" these concepts is exactly what the Court has done when it has held that state rather than tribal law governs tribal members outside of Indian country. The cases cited in the following subsections illustrate this. They also illustrate a fundamental principle of Indian law, as articulated by the Conference of Western Attorneys General: *"[A] tribe's inherent sovereign powers extend only to tribal territory,* [therefore] tribal claims of civil and criminal jurisdiction over member actions on fee lands will be dependent upon the status of those lands."[104] This principle is central to the resolution of the present case, but is ignored by the majority.

B. At Least Two of the Inherent Powers Recognized in United States v. Wheeler Do Not Extend Beyond Indian Country

United States v. Wheeler[105] held that an Indian tribe's "right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce

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[103] Slip Op. at 32.

[104] *American Indian Law Deskbook, supra* note 65, at 55 (emphasis added).

[105] 435 U.S. 313 (1978).

those laws by criminal sanctions."[106] This "power to punish tribal offenders is part of [a tribe's] own retained sovereignty."[107] Other retained sovereign powers of Indian tribes include the power "to regulate domestic relations among tribe members."[108]

The majority relies heavily on *Wheeler* in holding that the Northway tribal court has jurisdiction in the present case.[109] However, *Wheeler*, itself, does not answer the question posed by the present case because the events giving rise to the crime in *Wheeler* took place solely within the confines of Indian country.[110] Despite its extensive reliance on *Wheeler*, the majority never acknowledges this important difference between *Wheeler* and the present case. Thus, *Wheeler's* teachings about inherent tribal powers provide limited guidance in the present case. *Wheeler* describes how and from where such inherent powers are derived. But it does not indicate whether such powers extend outside of Indian country – the central issue here.

1. A Tribe's Inherent Power to Criminally Sanction Its Members Does Not Extend Outside of Indian Country

In order for the majority's reasoning and result to be correct, there should be authority indicating that the

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[106] *Id.* at 322.

[107] *Id.* at 328.

[108] *Id.* at 322 n.18 (citing *Fisher v. District Court*, 424 U.S. 382 (1976)).

[109] *See* Slip Op. at 23-26, 34.

[110] 435 U.S. at 315 n.3.

inherent tribal powers described in *Wheeler* extend outside of Indian country. But there is no such authority. To the contrary, there is definitive authority for the opposite conclusion: that a tribe's inherent power to punish tribal members does not extend beyond the confines of Indian country. For example, in *Organized Village of Kake*,[111] the Supreme Court observed: "State authority over Indians is yet more extensive over activities . . . not on any reservation. It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, *outside of Indian country.*"[112] This conclusion is not surprising. Even the majority most likely would not endorse the notion of granting Alaska tribes the authority to criminally punish tribal members; yet, that is the logical extension of today's decision.

In Solem v. Bartlett,[113] the Supreme Court made clear that the state's jurisdiction over Indians acting outside of Indian country was exclusive. *Solem* involved a habeas

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[111] 369 U.S. 60 (1962)

[112] *Id.* at 75 (emphasis added); *see also Hagen v. Utah*, 510 U.S. 399, 421 (1994) (Utah courts properly exercised criminal jurisdiction over an Indian who committed a crime, since the diminishment of the Uintah Indian Reservation meant that the location where the crime was committed was no longer Indian country).

A case to which the Supreme Court referred in *Organized Village of Kake*, 369 U.S. at 75, was *Pablo v. People*, 46 P.2d 636 (Colo. 1896). There a member of the Southern Ute Tribe killed another member of the tribe. Both Indians resided on the reservation, but the crime took place off the reservation. The Colorado Supreme Court held that Colorado state courts, not the tribal court, had jurisdiction.

[113] 465 U.S. 463 (1984).

corpus petition of an enrolled member of the Cheyenne River Sioux Tribe.[114] The question was whether the state had jurisdiction over a tribal member who had committed a crime.[115] The Supreme Court, as it has in numerous other cases,[116] resolved this issue by examining whether the actions giving rise to the dispute occurred in Indian country. The Court did so because it regarded actions outside of Indian country by tribal members to be under the exclusive jurisdiction of the state. The Court explained this concept broadly:

> As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, federal, state, and tribal authorities share jurisdiction over these lands if the relevant surplus land Act did not diminish the existing Indian reservation because the entire opened area is Indian country. . . . [117]

Solem is an important case because it shows that several of the premises upon which the majority's decision is based are wrong. First, it demonstrates that inherent tribal powers like those recognized in *Wheeler* do not extend beyond Indian country. Second, it shows that state

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[114] *Id.* at 465.

[115] *Id.*

[116] *See supra* note 95.

[117] 465 U.S. at 467.

jurisdiction over tribal members outside of Indian country is exclusive, not, as the majority concludes, concurrent with tribal authority.[118] This is clear because the Court held that "the States have jurisdiction" over Indians committing crimes on land that is freed "of its reservation status", but, "*[o]n the other hand*, federal, state, and tribal authorities *share* jurisdiction" if the land is Indian country.[119] Third, it disposes of the majority's unsupported assertion that jurisdiction over "land" has nothing to do with a tribe's jurisdictional authority over members.[120] The entire discussion in *Solem* is expressed in terms of jurisdiction over "lands" in order to determine jurisdiction over tribal members.[121] And fourth, *Solem* does away with the majority's claim that federal courts have not had the occasion to consider or "answer the question of what happens when a law like ANCSA separates [tribal] membership and land."[122] The Supreme Court did just that in *Solem* when it analyzed the surplus land Acts, which like ANCSA, "uncouple[d] reservation status [of the land] from Indian ownership."[123]

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[118] Slip Op. at 45-50.

[119] 465 U.S. at 467 (emphasis added).

[120] Slip Op. at 39.

[121] 465 U.S. at 467 & n.8: *see also* discussion *supra* Dissent Part V.C.

[122] Slip Op. at 32.

[123] 465 U.S. at 468. In making this observation I do not mean to suggest that ANCSA's abolition of reserves and reservations affected Northway, although it clearly affected a number of other villages which did occupy reserves or reservations. The briefs do not contain a showing that Northway ever occupied a reserve or reservation. Similarly, the record does not show that

2. A Tribe's Inherent Power to Regulate Domestic Relations Among Members Does Not Extend to Cases Arising Outside of Indian Country

The majority is correct in noting that tribes have the inherent power to regulate domestic relations among tribal members.[124] Both *United States v. Wheeler*[125] and *Montana v. United States*[126] recognized this power.[127] However, as the discussion above shows, the specific inherent power which was *Wheeler's* focus – the ability of tribes to criminally punish their members – does not extend beyond Indian country. Therefore, it is logical to conclude that neither do the other inherent powers recognized by *Wheeler.* Supreme Court case law bears this out, at least in terms of the power to decide child custody cases.

Supreme Court precedent holds that the inherent power over child custody cases does not extend to cases not arising in Indian country. One case so holding is

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the land where the parties resided was, before ANCSA, a reserve, reservation, or other type of Indian country. A pre-ANCSA description of reserves and reservations in Alaska does not mention reserves or reservations at Northway or Mentasta. Federal Field Committee for Development Planning in Alaska, *Alaska Natives & the Land* 444-45 (1968).

[124] Slip Op. at 34-35.

[125] 435 U.S. 313 (1978).

[126] 450 U.S. 544 (1981).

[127] 435 U.S. at 322 n.18; 450 U.S. at 564.

DeCoteau v. District County Court.[128] The other is *Fisher v. District Court.*[129]

C. DeCoteau

The issue in one of the two consolidated cases in *DeCoteau* was whether the tribal or state court had jurisdiction over custody proceedings involving Indian children.[130] The Supreme Court framed the issue as follows:

> In each of the two cases, the South Dakota courts asserted jurisdiction over members of the Sisseton-Wahpeton Tribe for acts done on lands which, though within the 1867 reservation borders, have been owned and settled by non-Indians since the 1891 Act. The parties agree that the state courts did not have jurisdiction if these lands are "Indian country," as defined in 18 U.S.C. § 1151. . . . [131]

The Court followed this statement with Footnote 2:

> *If the lands in question are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government. . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State,* except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished. . . . While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized

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[128] 420 U.S. 425 (1975).

[129] 424 U.S. 382 (1976).

[130] 420 U.S. at 426-29.

[131] *Id.* at 427.

> that it generally applies as well to questions of civil jurisdiction."[132]

The language of Footnote 2 delineates a straightforward jurisdictional scheme whereby tribal courts have jurisdiction over their members only if the actions of such members that gave rise to the dispute took place in Indian country. The majority disagrees, claiming that "the Court [in *DeCoteau*] did not consider the implications of the reservation's existence because it accepted a stipulation by the parties that the state had jurisdiction if the reservation had been terminated by Congress."[133]

The majority misreads *DeCoteau*. It confuses the stipulation and related assumption in Footnote 3 with the statements of law contained in Footnote 2, and the result is a dramatic mischaracterization of the import of the case. It is not true, as the majority claims, that "[a]fter describing the legal agreement between the parties, which the Court assumed without deciding was an accurate one,[134] the Court noted in [F]ootnote 2 that the parties relied on 11 U.S.C. §§ 1151(a) and (c) in formulating their stipulation."[135] Footnote 2, which precedes rather than follows Footnote 3, describes an entirely different legal concept – one that was not contested by the parties, but was not part of the stipulation described in Footnote 3.

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[132] *Id.* at 427 n.2 (emphasis added) (citations omitted).

[133] Slip Op. at 38 (citing *DeCoteau*, 420 U.S. at 426-28 & n.3.

[134] *Id.* at 38-39 (citing Footnote 3 of *DeCoteau*).

[135] *Id.* at 39.

The language of Footnote 2 does not describe the content of any kind of stipulation by the parties. Rather, Footnote 2 contains the Court's explanation as to why the parties to the case did not contest the settled issue that "state courts [do] not have jurisdiction if [the] lands are 'Indian country'."[136]

The fallacy of the majority's reading of *DeCoteau* can be illustrated in two ways. First, a close examination of Footnote 2 reveals that each assertion is supported by a citation to legal authority. It would be illogical to presume that the first two sentences of the footnote (containing the allocative principle) are a description of a stipulation by the parties, but the third sentence is an unannounced segue into the Court's legal analysis.

The second way to disprove the majority's reasoning is to compare the Court's treatment of the issue in Footnote 2 with that of the issue in Footnote 3. Footnote 3, in contrast to 2, does concern an agreement between the parties not to litigate an unsettled question of law. The parties stipulated that fifty percent of the mother's acts occurred on non-Indian, patented land. The Court noted:

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[136] 420 U.S. at 427. At the risk of being overly simplistic, this footnote can be compared to the following situation: If the Court's opinion stated "*The parties agree* that the defendant's confession should be suppressed if the defendant was in custody at the time of the questioning," and was followed by a footnote citing *Miranda* and other cases explaining the ramifications of custodial interrogation, "agree" as used in the text of the opinion could not be interpreted as a stipulation. Rather, it would reflect the parties' settled understanding of the state of the law as illustrated by the footnote.

> The parties here have assumed that the State had jurisdiction . . . if the non-Indian, patented lands were not "Indian country" under 18 U.S.C. § 1151(a). We have made the same assumption. We note, however, that § 1151(c) contemplates that isolated tracts of "Indian country" may be scattered checkerboard fashion over a territory otherwise under state jurisdiction. In such a situation, there will obviously arise many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory. How these conflicts should be resolved is not before us.[137]

The Court is explicit about the content of the assumption made by the parties – specifically, that the fifty percent figure would be sufficient to give the state court jurisdiction if the patented land was found not to be Indian country. The Court then raises the counter-argument to this position before openly declaring that the issue was not before the Court and would therefore not be decided. None of this careful disclaimer exists in Footnote 2, because Footnote 2 is a statement of law rather than a description of a stipulation.

The legal principle in Footnote 2 does not indicate where jurisdiction would lie if the activities giving rise to the dispute occurred partly in Indian country and partly outside Indian country. Footnote 3 raises that complex question, but indicates that the parties avoided the issue

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[137] 420 U.S. at 429 n.3.

by stipulating that fifty percent non-Indian country activity would be enough to confer state jurisdiction.[138]

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[138] State and federal courts have addressed this question in a variety of ways. The majority cites *In re Marriage of Skillen*, 956 P.2d 1 (Mont. 1998), and a few other decisions that hold that tribal and state courts share concurrent jurisdiction of domestic relations issues involving tribal members. Slip Op. at 759-760 & n. 146. These cases indicate that concurrent jurisdiction is a possible resolution to the complex issue of which court has jurisdiction when the dispute arises partly in Indian country and partly outside of Indian country. But such a concurrent jurisdictional scheme is *not* appropriate when the dispute arises completely within Indian country or completely outside of Indian country. In the former type of case, tribal court jurisdiction is exclusive. *See Fisher*, 424 U.S. at 389 ("Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive."). In the latter type of case – which is the case we decide today – state court jurisdiction is exclusive. *See DeCoteau*, 420 U.S. at 427 n.2. Thus, the majority's reliance on *Skillen* and the other cases in footnote 146 for its decision that Alaska now has concurrent jurisdiction is unconvincing. *Skillen* and the other cases all involve a hybrid, partly inside/partly outside of Indian country set of circumstances, but such circumstances are decidedly not present in the present case.

This is not to say that the question posed by Footnote 3 and in [sic] addressed in *Skillen* will never arise in Alaska. *Venetie II* held that the lands conveyed to Native corporations by ANCSA were not Indian country. 118 S.Ct. at 954-55. But this does not mean that there is no Indian country in Alaska. There are Native allotments and other categories of trust property. Thus, the hybrid circumstances of partly in and partly out of Indian country raised in Footnote 3 of *DeCoteau* and addressed in *Skillen* could arise in Alaska. In such a case, concurrent tribal and state court jurisdiction might be appropriate. But that is not the case here.

The facts of the present case fall squarely within the legal principle announced in Footnote 2 of *DeCoteau* – if the lands are not within Indian country "jurisdiction is in the State."[139] This is why I believe *DeCoteau* should control the resolution of today's case. The tribe in *DeCoteau*, like tribes, post-ANCSA, in Alaska which previously occupied reserves, had lost its Indian country. Both *DeCoteau* and today's case involve the same main issue – whether a tribal or state court has jurisdiction in an Indian child custody dispute. Thus, the result in our case should be the same as in *DeCoteau* – jurisdiction lies with the state, not tribal, court.

D. Fisher

In *Fisher*, the Tribal Court of the Northern Cheyenne awarded temporary custody of tribal member Ivan to Josephine Runsabove, also a tribal member, because the court had found that Ivan's mother had neglected him.[140] The tribal court later granted Ivan's mother's request for temporary custody.[141] Four days before the entry of that order, Runsabove and her husband initiated an adoption proceeding for Ivan in Montana state court.[142] Ivan's mother, who was also a tribal member, moved to dismiss this state court case for lack of subject matter jurisdiction,

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[139] 420 U.S. at 427 n.2.

[140] 424 U.S. at 383.

[141] *Id.*

[142] *Id.*

arguing that the tribal court possessed exclusive jurisdiction.[143] Upon receiving a certified question from the state court on the issue of which court had jurisdiction, a tribal appellate court held that the state court was without jurisdiction.[144] The Montana Supreme Court disagreed, holding that the state court had jurisdiction.[145] The United States Supreme Court reversed the Montana Supreme Court, noting that this was a case between Indians "arising out of conduct on an Indian reservation," and "[n]o federal statute sanctions this interference with tribal self-government" because, among other reasons, "Montana has not been granted . . . civil jurisdiction" over the reservation under P.L. 280.[146] The Court made it clear that the result would have been different if the litigants had not resided in Indian country:

> Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive. The Runsaboves have not sought to defend the state court's jurisdiction by arguing that any substantial part of the conduct supporting the adoption petition took place off the reservation. . . . *Since all parties resided on the reservation at all relevant times,* and since the reservation has not been partially terminated, *cf. DeCoteau v. District County Court,* 420 U.S. [425,] 429 n.3 [(1975)], *it appears that none of the acts giving rise to the adoption proceedings occurred off the reservation.* The Runsaboves do not contend

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[143] *Id.* at 383-84.

[144] *Id.* at 384.

[145] *Id.* at 385.

[146] *Id.* at 386, 388.

> otherwise. . . . *In a proceeding such as an adoption, which determines the permanent status of litigants, it is appropriate to predicate jurisdiction on the residence of the litigants.* . . . [147]

The Court's teaching is clear: since jurisdiction is to be predicated on the place of residence of the litigants, if the parties to the dispute had resided outside of Indian country the state court would have had jurisdiction. That is the situation in the present case, because the litigants here do not reside in Indian country.

Thus, I believe that *Fisher* squarely answers the issue presented by the present case. But the majority argues that *Fisher* supports *its* holding that the Northway tribal court has jurisdiction in this case. The majority does this in two ways: (1) by misreading *Fisher;* and (2) by citing a subsequent Supreme Court case in an attempt to reinterpret *Fisher's* analysis and holding. I address each of these efforts in turn.

1. Fisher's Language Does Not Support Jurisdiction Outside Indian Country

The majority argues that *Fisher* "provides an example of the Supreme Court's recognition of the dual nature of sovereignty[.]"[148] The majority acknowledges that the language in *Fisher,* cited above, makes it clear that the Supreme Court was holding that jurisdiction was in the tribal court because the child custody dispute arose in Indian country. But, the majority then quotes *Fisher* in the

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[147] *Id.* at 389 & n.14 (emphasis added) (footnote included).

[148] Slip Op. at 36.

following manner: "[t]he exclusive jurisdiction of the Tribal Court . . . [derives] from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law."[149] From this quote, the majority finds evidence for its "dual nature of sovereignty" theory by stating "*Fisher* therefore reflects both a recognition of territorial bases of sovereignty and an understanding that tribal status *itself* includes the power to adjudicate internal child custody disputes."[150] The use of the word "itself" means that the majority believes that tribal court jurisdiction can be based on territorial sovereignty, *or*, as to cases not arising in Indian country, a tribe's inherent sovereignty. Such a reading is not reasonable.

The Northern Cheyenne Tribe has quasi-sovereign status. The power derived from this status is what enabled the tribe to adjudicate the child custody case in *Fisher*. But the Court made clear that this power does not follow tribal members wherever they reside. Instead, it is confined to cases arising in Indian country.

The majority's "dual nature of sovereignty" reading of *Fisher* presumes that the Supreme Court's analysis in *Fisher* is internally inconsistent. The Supreme Court could not assert both that if the case arose outside Indian country, the state court would have jurisdiction,[151] and also that "tribal status itself includes the power to adjudicate internal child custody disputes,"[152] arising outside Indian

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[149] *Id.* at 37.

[150] *Id.* (emphasis added).

[151] *See Fisher*, 424 U.S. at 389 & n.14.

[152] Slip Op. at 37.

country. *Fisher* is not saying that tribal authority to adjudicate child custody cases is limited to cases arising in Indian country and that such authority is not limited to cases arising in Indian country. Yet that is what the majority's reading comes down to. Rather, *Fisher* can only be read as holding that the tribe has jurisdiction to adjudicate a child custody case involving tribal members because of its quasi-sovereign status, and that this jurisdiction is limited to cases arising in Indian country.[153]

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[153] In fact, the quote from *Fisher* on which the majority relies for its "dual nature of sovereignty" conclusion arose in the context of a discussion which did not concern tribal sovereignty and its limitations, but rather a race discrimination claim. The Court in *Fisher* concluded that the "jurisdiction of the Tribal Court is exclusive" "[s]ince the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation." 424 U.S. at 389. With the jurisdictional issue resolved, the Court stated that "[t]he remaining points [raised by the Runsaboves] may be dealt with briefly." *Id.* at 390. The Court then addressed the final issue of the case.

> Finally, we reject the argument that denying the Runsaboves access to the Montana courts constitutes impermissible racial discrimination. *The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.* Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of self-government. *Morton v. Mancari*, 417 U.S. 535, 551-555 (1974).

Id. at 390-91 (emphasis added).

By this point in the opinion, the Court had already concluded that the tribal court had jurisdiction. As is clearly

Indeed, consistent with many other Supreme Court cases,[154] *Fisher* treats the question of whether or not the dispute arose in Indian country as a threshold issue, upon which the outcome of the case rests. Finding that the case arose in Indian country, the Court applied the general rule favoring tribal authority in the absence of contrary congressional intent.[155] That *Fisher* treated the existence of Indian country as a threshold issue becomes even more clear in light of *Fisher's* citation to and reliance on *DeCoteau*.

As previously noted, in *DeCoteau* the Supreme Court found that the events giving rise to the Indian child custody dispute in question did *not* take place in Indian country. On that basis, the Court found that the state court had exclusive jurisdiction.[156] *DeCoteau* was twice

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evident, the analysis in the above paragraph centers on a different issue – the Runsaboves' racial discrimination claim. Nevertheless, the majority attempts to argue that this paragraph both addresses the issue of state versus tribal court jurisdictional authority *and* supports the unwarranted conclusion that tribal jurisdictional authority based only on inherent sovereignty can exist outside of Indian country. This reasoning by the majority is not related to or supported by the above paragraph, which focuses not on tribal jurisdiction but on whether such jurisdiction amounts to impermissible racial discrimination.

[154] *See supra* Dissent Part V.B.

[155] 424 U.S. at 386 (emphasis added) (citations omitted) ("In litigation . . . arising out of conduct *on an Indian reservation*, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.' ").

[156] 420 U.S. at 427-28 & n.2.

cited by *Fisher*.[157] *Fisher*, which "predicate[s] jurisdiction on . . . residence" must, like *DeCoteau*, be read as standing for the proposition that Indian country is a requirement for tribal court jurisdiction in child custody cases where a tribe exercises its inherent sovereign authority over its members. To read Indian country as somehow merely optional or as just an alternative path to jurisdiction, as the majority does, is plainly inconsistent both with *Fisher* and *DeCoteau*.[158]

2. Iowa Mutual's Citation to Fisher Does Not Persuasively Reinterpret Fisher's Meaning

The majority attempts to reinterpret *Fisher's* teachings by relying on the following statement from *Iowa*

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[157] *See Fisher*, 424 U.S. at 389 and 389 n.14 (citing *DeCoteau*, 420 U.S. at 428-30 and 429 n.3.

[158] *Fisher*, correctly interpreted, also highlights an anomalous outcome of the majority's decision – Alaska's Northway tribe, which is not based in Indian country, has broader jurisdiction than the Northern Cheyenne tribe in *Fisher*, whose authority is limited to the territorial confines of its reservation. *See Fisher*, 424 U.S. at 389. Indeed, the essence of *Fisher*, read in conjunction with *DeCoteau*, is that as a tribe loses its reservation or Indian country its tribal court jurisdictional authority is diminished. *See DeCoteau*, 420 U.S. at 427 n.2. But the result in today's opinion runs counter to this principle. The majority's decision can be read as holding that once the point is reached where there is no Indian country, tribal jurisdiction is freed from any territorial requirement and therefore can expand to wherever tribal members reside. *Fisher* and *DeCoteau* contradict this view.

Mutual Insurance Co. v. LaPlante:[159] "If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. *See Fisher v. District Court*, 424 U.S. 382 (1976)."[160] The majority maintains that *Iowa Mutual* shows that *Fisher's* holding stemmed from the tribe's sovereign powers and not its connection to Indian country.[161]

The majority's interpretation of *Iowa Mutual's* citation to *Fisher* is directly at odds with *Strate v. A-1 Contractors*.[162] *Strate* is a much more recent Supreme Court pronouncement on tribal court adjudicatory authority. It does not simply cite *Fisher*, as *Iowa Mutual* does, but directly explains the holding in *Fisher*, something that *Iowa Mutual* does not do. *Strate* states:

> The Court held in *Fisher* that a tribal court had exclusive jurisdiction over an adoption proceeding when all parties were members of the tribe *and* resided on its reservation. . . . The Court observed in *Fisher* that state courts may not exercise jurisdiction over disputes *arising out of on-reservation conduct* – even over matters involving non-Indians – if doing so would "infring[e] on the right of *reservation Indians* to make their own laws and be ruled by them."[163]

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[159] 480 U.S. 9 (1987).

[160] *Id.* at 15, Slip Op. at 36.

[161] Slip Op. at 36-38.

[162] 520 U.S. 438 (1997).

[163] 520 U.S. at 452-53 (quoting *Fisher*, 424 U.S. at 386) (emphasis added).

Later in the opinion, the Court in *Strate* interprets a citation that *Montana v. United States* made to *Fisher.*[164] The Court in *Strate* described *Montana's* analysis in the following way: "The [*Montana*] Court referred first to the decision [in *Fisher*] recognizing the exclusive competence of a tribal court over an adoption proceeding when all the parties belonged to the Tribe *and* resided on its reservation. *See Fisher*, 424 U.S. at 386."[165]

Strate's explanation of *Fisher* leaves no doubt that the Supreme Court views the existence of Indian country as a critical factor in *Fisher's* analysis. Its use of the word "and," not "or," each time it analyzed *Fisher* shows that the Court viewed the tribe's connection to Indian country as a determining factor in its holding that the tribal court in *Fisher* had jurisdiction over the child custody dispute. *Strate*, therefore, closes the door on the majority's interpretation of *Fisher* that would have *Fisher* stand for the proposition that tribal courts can adjudicate child custody cases not arising in Indian country.

Also, *Strate* makes it clear that to the extent that *Iowa Mutual* is cited for authoritative statements on the scope of tribal jurisdictional powers (as the majority does)[166] it is no longer persuasive law. The Supreme Court in *Strate* emphasizes this point throughout its opinion.

> Both [*Iowa Mutual* and *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985)] describe an exhaustion rule allowing

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[164] *Id.* at 458 (quoting *Montana*, 450 U.S. at 566).

[165] *Id.* (emphasis added).

[166] *See* Slip Op. at 36.

> tribal courts initially to respond to an invocation of their jurisdiction; *neither establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases.* . . . Recognizing that our precedent has been variously interpreted, we reiterate that *National Farmers* and *Iowa Mutual* enunciate *only* an exhaustion requirement. . . . *These decisions do not expand* or stand apart from *Montana's* instruction on "the inherent sovereign powers of an Indian tribe."[167]

3. Fisher Does Not Concern Concurrent State Jurisdiction

The majority states that the main issue in *Fisher* was "whether Montana had any basis to assert *concurrent* jurisdiction."[168] But the word "concurrent" does not appear anywhere in the *Fisher* opinion.

Instead of indicating that it was envisioning a concurrent jurisdictional scheme, the Court stated that it was "appropriate to *predicate* jurisdiction on the residence of the litigants." Because "all parties resided on the reservation at all relevant times" the state court was without jurisdiction.[169] This language contains no hint that the Supreme Court was contemplating a system of shared jurisdiction. To the contrary, the phrase "predicate jurisdiction on the residence of the litigants" fits squarely

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[167] *Strate*, 520 U.S. at 448, 453 (emphasis added).

[168] Slip Op. at 39.

[169] *Fisher*, 424 U.S. at 389 n.14.

within the theoretical framework of the allocative principle – tribal jurisdiction if within Indian country and state jurisdiction if outside of Indian country.

Fisher's reliance on and citations to *DeCoteau* also indicate that *Fisher's* focus was determining whether the state or tribe had exclusive jurisdiction. Both cases centered on the same issue – whether the state or tribal court had jurisdiction over an Indian child custody dispute. Footnote 2 of *DeCoteau* is an explicit statement that the Court viewed the jurisdiction in that case to be exclusive.[170] Nothing in *Fisher*, which was decided only one year after *DeCoteau*, signals a change to a system of concurrent jurisdiction.

E. Other Case Law

In an attempt to illustrate the principle that tribal courts, outside of Indian country, can predicate jurisdictional authority over members and nonmembers on nothing more than the tribe's inherent sovereignty powers, the majority cites two Supreme Court tax cases,[171] *Oklahoma Tax Commission v. Sac and Fox Nation*,[172] and *Oklahoma Tax Commission v. Chickasaw Nation*.[173] But the

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[170] *See DeCoteau*, 420 U.S. at 427 n.2 ("jurisdiction is in the tribe" if the custody dispute took place "within a continuing 'reservation' " and "[o]n the other hand," "jurisdiction is in the State" "if the lands are not within a continuing reservation.").

[171] Slip Op. at 41-42.

[172] 508 U.S. 114 (1993).

[173] 515 U.S. 450 (1995).

majority does not rely on what the Supreme Court actually held in these cases. *Sac and Fox Nation* held that Oklahoma's income tax did not apply to tribal members earning income from tribal employment within Indian country who also resided within Indian country.[174] The Court also held that Oklahoma's vehicle and excise tax and registration fees did not apply to tribal members living in Indian country.[175] *Chickasaw Nation* held that the State of Oklahoma may tax the income of Indian tribal members who work for the tribe in Indian country, but reside outside of Indian country.[176] The Court also held that Oklahoma could not tax motor fuel sold by the tribe within Indian country.[177] Thus, these cases illustrate the continued importance of whether a case arises in Indian country in delineating the proper allocation of tribal and state power.

Despite the holdings in *Sac and Fox Nation* and *Chickasaw Nation*, which do not support today's decision, the majority, through the use of pliable phrases like "the Court implied"[178] or the cases "suggest,"[179] argues that these cases support its decision.[180] The majority goes so

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[174] 508 U.S. at 123-25.

[175] *Id.*

[176] 515 U.S. at 462-64.

[177] *Id.* at 453.

[178] Slip Op. at 41-42 (using the term "implied" two times in its discussion).

[179] *Id.* at 44.

[180] The majority does the same with *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 118 S. Ct. 1700 (1998), a case which deals with sovereign immunity, not jurisdiction. Slip Op.

far as to argue that "[b]y deliberately leaving the door open for tribal governments to conduct internal self-governance functions in the absence of Indian country, *Chickasaw Nation* and *Sac and Fox Nation* suggest that Northway Village has jurisdiction to hear this [child custody] dispute[.]"[181]

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at 43. The two concepts are distinct. A legal obligation may exist, but not be enforceable. The *Kiowa* Court addressed this distinction at some length and reaffirmed the principle that state laws govern conduct outside of Indian country even though a tribe enjoys sovereign immunity for conduct outside of Indian country:

> We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In [*Oklahoma Tax Commission v. Citizen Band*] *Potawatomi [Indian Tribe of Oklahoma*, 498 U.S. 505 (1991)], for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S. at 510. There is a difference between the right to demand compliance with state laws and the means available to enforce them.

118 S. Ct. at 1703.

[181] Slip Op. at 42.

The dicta in these cases[182] do suggest that it is an open question whether a tribe in the exercise of inherent sovereignty may tax income earned from tribal employment in Indian country by members who do not reside in Indian country. Perhaps this also suggests the possibility that there are other powers derived from inherent sovereignty which extend beyond the boundaries of Indian country.[183] But we know because of *Fisher* and *DeCoteau* that the power to decide child custody cases is not among such powers. Thus, with regard to jurisdiction to hear child custody cases arising outside of Indian country, *Fisher* and *DeCoteau* have already shut the door the majority maintains is still "open."

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[182] The *Sac and Fox Nation* statement is as follows:

> Because all of the tribal members earning income from the Tribe may live within Indian country, we need not determine whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country.

508 U.S. at 126. The *Chickasaw Nation* quote is: "Notably, the Tribe has not asserted here, or before the Court of Appeals, that the State's tax infringes on tribal self-governance." 515 U.S. at 464.

[183] Alternatively, income earned from tribal employment in Indian country by tribal members who reside outside of Indian country may have a close enough nexus to Indian country to give rise to a presumption favoring tribal jurisdiction under the allocative principle. Another possibility is that the state power to tax such income will be upheld, as it was in *Chickasaw Nation*.

VII. Executive and Statutory Authority Relied on by the Majority

As the discussion above demonstrates, substantial case law from the United States Supreme Court establishes the allocative principle. Outside of Indian country, this principle provides that absent "express federal law to the contrary," "beyond reservation boundaries" Indians "have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state."[184] Since there is no express federal law that grants the Northway tribal court jurisdictional authority over the custody dispute in this case, it should follow, because the dispute arose outside of Indian country, that Northway is without jurisdiction. But the majority finds that "the intent of the Executive Branch" and "federal statutes" is to grant the Northway tribal court jurisdictional authority in the present case, despite the absence of Indian country.[185] As shown below, neither the intent of the executive branch nor any federal statute legitimizes or supports the majority's decision.

A. Executive Advocacy as to the Extent of Tribal Court Jurisdiction Is Not Entitled to Special Deference

The majority states that "since this court *defers* to determinations of tribal status by the Executive Branch or by Congress, we *similarly* accept their conclusion that,

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[184] *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 465; *see also* authorities discussed *supra* Dissent Part V.A.

[185] Slip Op. at 2.

even after ANCSA, federally recognized Alaska Native tribes like Northway Village retain sovereignty to adjudicate domestic disputes between members."[186] While it is true that we give conclusive deference to the determinations of Congress on all matters of federal law, Congress has not concluded that Alaska tribes have authority to adjudicate child custody cases arising outside of Indian country.

It is also true that tribal recognition by the Department of the Interior is given conclusive deference as a non-justiciable political question,[187] presumably because the Department has been delegated authority by Congress to make such a determination. But it does not follow that we give similar deference to the executive branch on questions concerning the extent of tribal authority. In fact, we do not.

Only Congress can prescribe the allocation of authority between tribes and states.[188] Once tribal status has been granted, the executive's role in disputes concerning tribal and state power is usually that of an advocate. While executive recognition of tribal status is non-justiciable, executive advocacy concerning tribal power is not similarly conclusive. To the contrary, in numerous disputes involving the extent of tribal court jurisdiction, the Supreme Court has rejected arguments by the executive

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[186] *Id.* at 29 (emphasis added).

[187] *See Atkinson v. Haldane*, 569 P.2d 151, 162-63 (Alaska 1977).

[188] *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate" tribal powers).

branch that urged an expansion of tribal authority.[189] Thus, the majority opinion is wrong in stating that we must accept the Department of Justice's arguments on tribal court jurisdiction in this case in the same way that we are bound to accept the Interior Department's determination of tribal status.

B. Statutory Analysis

The majority does not acknowledge or apply the "general rule" that, absent "express federal law to the contrary," tribal authority does not extend beyond Indian country.[190] However, the majority does hold that "the intent of Congress, as revealed by the Tribe List Act, ICWA, and the Tribal Justice Act," bestows upon Alaska Native tribal courts the jurisdictional authority to hear child custody disputes arising outside of Indian country.[191] None of the statutes relied upon by the majority grants to tribal courts jurisdiction over child custody cases between parents not arising in Indian country. None is therefore the "express federal law" needed to overcome the presumption against tribal adjudicatory authority outside of Indian country which should control this case.[192]

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[189] *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 447 (1997); *Duro v. Reina*, 495 U.S. 676, 685 (1990); *Montana v. United States*, 450 U.S. 544 (1981).

[190] *See, e.g., Chickasaw Nation*, 515 U.S. at 465.

[191] Slip Op. at 31.

[192] *See, e.g., Mescalero Apache Tribe*, 411 U.S. at 148-49.

1. The Canon of Construction Favoring Native Americans Is Inapplicable to This Case

In analyzing the statutes upon which it relies, the majority uses the canon of construction that requires courts to "resolve ambiguities in statutes affecting the rights of Native Americans in favor of Native Americans."[193] However, it is not at all clear to which statute the majority is applying the canon. There is no statute that the majority cites that can be said, even ambiguously, to bestow concurrent jurisdiction on tribal courts in Alaska.

Further, the canon does not apply for another reason. The parties to this dispute are Anita John and John Baker, both of whom are Native Alaskans. The Native Village of Northway is an amicus curiae. Baker does *not* want the Northway tribal court to have jurisdiction in this case, in part because he believes that his rights and the rights of his children will be adversely affected by the assumption of jurisdiction by the tribal court. Yet, the majority applies its assumption "in favor of Native Americans" for John and the Northway tribe at the expense of Baker. Since Native Alaskans are on both sides of the case, the canon should apply to both, or neither. Either way, it is a non-factor.

The Supreme Court in *Northern Cheyenne Tribe v. Hollowbreast*[194] has recognized this. The Court stated that when a suit involves the competing interests of tribes and

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[193] Slip Op. at 27-28 (citing *In re F.P.*, 843 P.2d 1214, 1219 (Alaska 1992)).

[194] 425 U.S. 649 (1976).

tribal members the canon of construction favoring Indians "has no application."[195]

2. ANCSA[196]

The majority states that "ANCSA itself . . . support[s] Northway's jurisdiction over child custody matters."[197] In fact, ANCSA makes clear that of all the things it was intended to do, expanding tribal court jurisdiction in Alaska was *not* one of them.[198] As demonstrated in Section II of this dissent, Alaska Natives have always been subject to the same laws as non-Natives, administered only by territorial and state courts open to both Natives and non-Natives. ANCSA rejected any notion that it should be interpreted as expanding tribal court jurisdiction or Native sovereignty in any way: "Congress finds and declares that – the settlement [of Native Alaskan land claims] should be accomplished rapidly . . . without establishing any permanent racially defined institutions, rights, privileges, or obligations. . . . "[199]

Still, the majority proceeds from the premise that "Congress did not intend for ANCSA to divest tribes of their powers to adjudicate domestic disputes between members."[200] Thus, the majority's approach is to look at

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[195] *Id.* at 655 n.7.

[196] 43 U.S.C. §§ 1601-29 (1994).

[197] Slip Op. at 28.

[198] 43 U.S.C. § 1601(f).

[199] *Id.* § 1601(b).

[200] Slip Op. at 29.

Congress's intent in ANCSA and ask whether Congress in abolishing reservations and reserves intended to take away important aspects of tribal sovereignty. My view is different. The consequences that flow from the revocation of reserves and reservations by ANCSA are the same as the consequences which would result from the revocation of Indian country with respect to any tribe in the United States. That is why *Fisher* and *DeCoteau* are so persuasive with regard to this case.

The Supreme Court's decision in *Venetie II*[201] vindicates my approach. That decision shows that the revocation of reservations and reserves by ANCSA had the same meaning as the revocation of Indian country elsewhere. For example, the power to tax is an inherent tribal power.[202] But the ruling in *Venetie II* was that because ANCSA revoked the Venetie reserve and did not create new types of Indian country, the village of Venetie could not exercise that power.[203] The Court said that Indian country as defined in 18 U.S.C. § 1151 "generally applies to questions of civil jurisdiction such as the ones at issue here. *See DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975)."[204] This is important for two reasons. First, it is a statement that the existence or nonexistence of Indian country is determinative of "questions of civil jurisdiction" in Alaska and elsewhere. Second, because the language "such as the

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[201] 118 S. Ct. 948 (1998).

[202] *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

[203] 118 S. Ct. at 952-56.

[204] *Id.* at 952.

ones at issue here" is followed immediately by the citation to *DeCoteau* Footnote 2, it analogizes the issue in *Venetie II*– the inherent power and jurisdiction to tax – with the issue in *DeCoteau* Footnote 2 – the inherent power and jurisdiction over child custody disputes. The consequence of the tribe's loss of Indian country in *DeCoteau* was that the tribe lost the power to adjudicate tribal child custody disputes arising in what was no longer Indian country. *Venetie II's* citation to Footnote 2 of *DeCoteau* makes clear that the Supreme Court had the analytical framework of *DeCoteau* in mind when the Court examined tribal power, post-ANCSA, in Alaska.

3. The Tribe List Act[205]

Although the Tribe List Act formally recognizes Alaska Native villages as tribes, it does not in any way expand tribal powers. Rather, as the Department of the Interior explained, Native villages in Alaska "have the right, *subject to general principles of Federal Indian law,* to exercise the *same inherent* and delegated *authorities* available to other tribes. . . . "[206] General principles of federal Indian law would have prevented the Northern Cheyenne tribal court in *Fisher* from assuming jurisdiction over a child custody dispute between tribal members had that dispute arisen outside of Indian country.[207] Similarly in *DeCoteau,* general principles of federal Indian law dictated that a South Dakota court rather than the Sisseton-

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[205] 25 U.S.C. §§ 479(a)-479(a-1) (1994).

[206] 58 Fed. Reg. 54,366 (1993) (emphasis added).

[207] *See Fisher,* 424 U.S. at 389.

Wahpeton tribal authorities had jurisdiction over the children there involved because the tribe's reservation had been terminated. Because the same general principles apply to the present case, the result here should be that the Northway tribal court lacks jurisdiction. The addition of Alaska Native villages to the Tribe List Act does nothing more than confirm the correctness of this result.

That special privileges were not intended to be granted Alaska Native tribes is also made clear by the House Report accompanying the Tribe List Act which states that the Act neither confers nor denies sovereignty. This report stated:

> The Committee notes . . . that there is extensive litigation on the subject of the precise sovereign powers of Alaska Native Tribes. While these issues deserve further review by Congress, *nothing in this Act should be construed as enhancing, diminishing, or changing in any way the status of Alaska Native Tribes.* It is the intent of the Committee that its previous position taken in the 1987 amendments to the Alaska Native Land Claims Settlement Act be maintained and that *nothing in this Act shall "confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands . . . or persons in Alaska."* P.L. 100-241, Section 2(8)(B). [This] Act merely requires that the Secretary continue the current policy of including Alaska Native entities on the list of Federally recognized Indian tribes which are eligible to receive services.[208]

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[208] H.R. Rep. No. 103-781, at 5 (1994) (emphasis added), *reprinted in* U.S.C.C.A.N. 3771.

This language is plain: Congress did not intend the Tribe List Act to be a vehicle for expanding or diminishing tribal power. But the majority explicitly relies on the Tribe List Act as authority to change the allocation of jurisdictional authority over tribal children between tribal and state courts as laid out in decisions of the United States Supreme Court. Thus, the majority "construes" the Act in a way that Congress forbade – it uses the Act as a means to expand tribal jurisdictional authority.

4. The Tribal Justice Act[209]

The majority's reliance on the Tribal Justice Act is equally unpersuasive. The Tribal Justice Act focuses primarily on establishing, organizing, and funding, within the Department of the Interior, the Office of Tribal Justice Support.[210] The Act also establishes responsibilities, goals, and funding for the Secretary of the Interior in working toward the development and betterment of tribal justice systems.[211] In its "Findings" the Act is protective of tribal rights that have *already* been established by Congress or the courts.[212] But nothing in the Act extends or bestows *any additional jurisdiction* to tribal courts. And because neither Congress nor the Supreme

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[209] 25 U.S.C. §§ 3601-3631 (1994).

[210] *Id.* § 3611.

[211] *Id.* §§ 3612, 3613, 3614, 3621.

[212] *Id.* § 3601(6) ("Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights[.]").

Court has bestowed upon tribal courts the jurisdiction to hear child custody disputes not arising in Indian country between parents, neither does the Tribal Justice Act.[213]

5. The Indian Child Welfare Act (ICWA)

a. ICWA Should Not Be Extrapolated

ICWA does not apply to this case. The majority acknowledges this.[214] Nevertheless, the majority relies on "the intent of Congress, as revealed by . . . ICWA" for its holding that the Northway tribal court has jurisdiction over the child custody dispute in this case.[215] We have observed that "a statute may form the basis for a common law rule which applies beyond the prescribed scope of the statute."[216] That observation was accompanied by a

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[213] This is not to say that tribal courts in Alaska are left without any jurisdiction. They have delegated jurisdiction, as in cases to which ICWA applies, 25 U.S.C. §§ 1901-63, and inherent jurisdiction to decide internal matters pertaining to tribal membership and organization. *See* 25 U.S.C. § 3601(4) ("Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems."). Furthermore, tribal courts can and do perform other important justice-related functions by deferral and consent. For example, state law enforcement authorities may defer prosecution of juvenile offenses with the consent of the juvenile so that the case may be handled by a tribal court. *Directory of Dispute Resolution in Alaska Outside Federal and State Courts*, Alaska Judicial Council (March 1999) at 11-12. For an extensive list of the services performed by tribal courts, *see id.* at 29-102.

[214] Slip Op. at 13.

[215] *Id.* at 31.

[216] *Hanebuth v. Bell Helicopter Int'l*, 694 P.2d 143, 146 (Alaska 1984).

quotation from *Moragne v. States Marine Lines, Inc.*,[217] which indicates when a principle may be extrapolated from legislation and made a part of general decisional law and when extrapolation should not take place. The Supreme Court in *Moragne* stated:

> The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical. This conclusion is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations, and where the generality of the underlying principle is attested by the legislation of other jurisdictions. On the other hand, the legislature may, in order to promote other, conflicting interests, prescribe with particularity the compass of the legislative aim, erecting a strong inference that territories beyond the boundaries so drawn are not to feel the impact of the new legislative dispensation.[218]

Because Congress explicitly excluded from ICWA's coverage divorce proceedings[219] and, as the majority points

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[217] 398 U.S. 375, 392 (1970).

[218] *Id.* (citation omitted).

[219] 25 U.S.C. § 1903(1).

out, this exclusion was intended to encompass child custody proceedings between unmarried as well as married parents,[220] ICWA presents a case in which Congress in recognition of conflicting interests has, to use the language of *Moragne*, "prescribe[d] with particularity the compass of the legislative aim, erecting a strong inference that territories beyond the boundaries so drawn are not to feel the impact of the new legislative dispensation."

Further, we have already held that the extrapolation method that the majority engages in today is inappropriate with regard to ICWA. In *Catholic Social Services, Inc. v. C.A.A.*,[221] we cautioned against interpreting ICWA in ways that extend it beyond its intended scope. In that case the superior court found that under ICWA an Indian child's tribe is entitled to notice of a proceeding for voluntary termination of parental rights, even though the statute itself contained no notice requirement.[222] We reversed, holding that "[i]n enacting [ICWA], Congress has both *created and defined tribal rights in adoption and termination proceedings*. The provisions of the Act . . . *define the scope of tribal rights. The Act strikes a balance between the sometimes conflicting interests* of Indian parents, Indian children, and their tribes."[223] Today the majority ignores *Catholic Social Services'* admonition that it is the

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[220] Slip Op. at 11-14.

[221] 783 P.2d 1159 (Alaska 1989).

[222] *Id.* at 1161-62.

[223] *Id.* at 1160 (emphasis added); *see also In re T.N.F.*, 781 P.2d 973, 977 (Alaska 1989) ("We have serious policy reservations concerning the creation of judicial exceptions to the plain language of ICWA. . . . ").

business of Congress, not the courts, to create, define, and also limit the scope of tribal rights with regard to ICWA.[224]

b. The Majority Decision Ignores Essential Protections Which Congress Built into ICWA

Moreover, even assuming that the majority is correct in its assumption that "the intent of Congress, as revealed by . . . ICWA,"[225] could apply to this case, the majority's decision would still be flawed. In enacting ICWA, Congress crafted two important protections relevant to this case which the majority's improvised extension of jurisdiction ignores.

First, ICWA provides that before tribes which became subject to state jurisdiction in P.L. 280 states can reassume jurisdiction they must obtain the approval of the Secretary of the Interior to a plan for the reassumption of jurisdiction.[226] The regulations for reassumption of jurisdiction contain detailed provisions designed to insure that any tribe reassuming jurisdiction has an appropriately organized tribal court, and that there are clear procedures for identifying persons who will be subject to

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[224] *See generally, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

[225] Slip Op. at 31.

[226] 25 U.S.C. § 1918(a) (1994).

its jurisdiction.[227] Further, notice of approval of a reassumption plan must include a clear description of the territory in which jurisdiction will be exercised.[228]

Second, in ICWA cases which arise outside of Indian country tribal courts only have what is called "transfer jurisdiction."[229] This jurisdiction can only be exercised with the consent of both parents.[230] Thus it was the judgment and intent of Congress that tribal court jurisdiction should not reach beyond the boundaries of Indian country in ICWA cases unless both parents agree to the use of the tribal forum. The Department of the Interior guidelines for interpreting ICWA specifically refer to this provision as "an absolute veto power over transfers" to

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[227] 25 C.F.R. 13.11-12 (1999).

[228] *Id.* at 13.14(b).

[229] *See* 25 U.S.C. § 1911(b) (1994), which states:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

[230] *Id.*

tribal courts by either parent.[231] This power has a purpose which is critical in Alaska. It is to give to either parent of a child not living in Indian country the power to decide whether an adjudication of custody by a tribal court would be inappropriate because of the child's lack of contact with the tribe or its culture. The Interior Department discusses this point in its "Guidelines for State Courts":

> The first four criteria in the earlier version were all directed toward the question of whether the child's connections with the reservation were so tenuous that transfer back to the tribe is not advised. . . . It is recommended that in most cases state court judges not be called upon to determine whether or not a child's contacts with a reservation are so limited that a case should not be transferred. This may be a valid consideration since the shock of changing cultures may, in some cases, be harmful to the child. This determination, however, can be made by the parent, who has a veto over transfer to tribal court.[232]

The protections which Congress built into ICWA will not be available in cases decided under today's decision. There will be no advance review of the organization and function of tribal courts by an agency with the expertise and authority to conduct such a review. The territorial limits of tribal courts are not defined or established. And the vital parental veto power over tribal court jurisdiction, a power which can be exercised by either parent

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[231] 44 Fed. Reg. 67,591 (1979).

[232] *Id.*

under ICWA, is simply dispensed with under today's decision.

The loss of these protections illustrates the danger of the extrapolative method used by the majority. Not only is the jurisdiction of tribal courts expanded to cases which Congress considered *and* excluded in enacting ICWA, but important protections which Congress built into ICWA do not survive in the majority's extension of jurisdiction.

VIII. Even Assuming that Tribal Courts Have Inherent Sovereign Power to Hear Child Custody Cases Not Arising in Indian Country, the Majority Decision Is Still Erroneous Because It Enables a Tribal Court to Utilize this Power Over a Non-Tribal Member

Even if federal case law supported the majority's position, by holding that the inherent sovereign powers of tribes to "regulate internal domestic relations" between their members did extend beyond Indian country in child custody cases, the majority's decision today would still be erroneous because it extends the reach of this power to individuals who are not tribal members. There is no authority to expand a tribe's inherent powers in such a way.

A. Case Law: Tribal Inherent Sovereignty Powers Relate Only to Tribal Members

The Supreme Court cases that have analyzed the extent of inherent tribal sovereignty have stated that such power pertains to internal tribal matters and tribal members only. The majority recognizes, and even emphasizes,

this.[233] Thus, the Court in *Montana v. United States*[234] stated: "[T]he powers of self-government . . . involve *only the relations among members of a tribe*. . . . Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations *among members*, and to prescribe rules of inheritance *for members*."[235] The Supreme Court's "members only" emphasis in its discussions of inherent sovereignty has been purposeful, as was noted by the Court in *Duro v. Reina*:[236] "[In][o]ur discussion of tribal sovereignty in *Wheeler* . . . [w]e were consistent in describing retained tribal sovereignty over the defendant in terms of a tribe's power over its *members*."[237] Thus, a tribal court's powers, deriving from its inherent sovereignty, generally do *not* extend to non-tribal members. This was made clear in *Montana* and reemphasized by the Court in *Strate*: "In the main, the [*Montana*] Court explained, 'the inherent powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – 'do not extend to the activities of nonmembers of the tribe.' "[238]

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[233] *See* Slip Op. at 33-36.

[234] 450 U.S. 544 (1981).

[235] *Id.* at 564 (first emphasis in original, second and third emphasis added) (quoting *United States v. Wheeler*, 435 U.S. 313 (1978)).

[236] 495 U.S. 676 (1990).

[237] *Id.* at 685 (emphasis in original).

[238] *Strate*, 520 U.S. at 445-46; *cf. Reina*, 495 U.S. at 679 (holding that "the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions" on a nonmember Indian who committed murder on the tribe's reservation).

Throughout its discussion of inherent sovereignty, the majority relies on many of the cases cited above, such as *Montana*, *Wheeler*, and *Reina*, in support of its conclusion that the Northway tribal court has jurisdiction in this case.[239] However, only near the end of opinion does the majority try to reconcile the fact that while the Supreme Court authority it relies upon to establish the concept of inherent sovereignty emphasizes inherent tribal powers over *members*, the dispute in this case is actually between a tribal member and *nonmember*.[240]

The majority sidesteps this by announcing a new rule that is not based on supporting legal authority. That rule is: "Because the tribe only has subject matter jurisdiction over the internal disputes of tribal members, it has the authority to determine custody only of children who are members or eligible for membership."[241] Thus, the majority authorizes tribal court jurisdiction over cases involving a member Native child where both parents are tribal members and where one parent is a tribal member and one is not.[242]

In a child custody dispute, a court should have jurisdiction over the child and the child's parents or other custodians. The majority states that a tribe "only has subject matter jurisdiction over the internal disputes of

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[239] Slip Op. at 23-27, 35-36.

[240] *Id.* at 44-45.

[241] *Id.*

[242] *Id.*

tribal members."[243] Where both parents are tribal members this condition is satisfied. But it is not satisfied when one of the parents is not a tribal member. Since "the powers of self-government . . . involve only the relations among members of a tribe" and since "Indian tribes retain their inherent power to . . . regulate domestic relations among members,"[244] it follows that jurisdiction based on inherent sovereignty cannot extend to disputes involving nonmembers. Accordingly, even assuming that a tribe's inherent powers extend to cases not arising in Indian country, the Northway court should not have jurisdiction in this case because its inherent power does not encompass authority over John, who is not a member of the Native village of Northway.

B. The Montana Exceptions Do Not Apply

The majority states that the consent of a nonmember parent may be an "alternative basis for tribal court jurisdiction in child custody cases."[245] The majority cites *Montana* for this consent theory.[246] But *Montana* does not support this theory.

The majority's cite to Montana references one of the two "Montana exceptions."[247] *Strate* explains the two exceptions in the context of *Montana*: "*Montana* thus

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[243] *Id.* at 44.

[244] *Montana*, 450 U.S. at 564 (quoting *United States v. Wheeler*, 435 U.S. 313 (1978)).

[245] Slip Op. at 45 n.141.

[246] *Id.* (citing *Montana*, 450 U.S. at 565).

[247] *See Strate*, 520 U.S. at 446-47.

described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers" subject to "two exceptions."[248] The two *Montana* exceptions, upon which the majority relies upon as authority to enable the Northway court to exercise inherent sovereign power over a consenting nonmember, are as follows:

> [(1)] To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [And, (2)] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians *on fee lands within its reservation* when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[249]

Neither of the two *Montana* exceptions applies to this case because each specifically involves the exercise of inherent tribal power over nonmembers *in Indian country*. That is not the case here. Thus, the majority's claim that "federal law supports the determination that tribes have

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[248] *Id.* These "two exceptions" allow "in certain circumstances, even where Congress has not expressly authorized it, tribal civil jurisdiction [to] encompass nonmembers." *Id.* at 446.

[249] *Montana*, 450 U.S. at 565-66 (internal citations omitted) (emphasis added); *Strate*, 520 U.S. at 446-47; Slip Op. at 44-45 n.140.

jurisdiction over consenting nonmembers in some situations"[250] is only true in the limited context of nonmembers *in Indian country*. No Supreme Court case has held that outside of Indian country, a tribal court has the inherent power to exercise jurisdictional authority over a nonmember, consenting or otherwise. Because there is no authority to support an assertion of inherent tribal powers over nonmembers, this is another basis for holding that the Northway tribal court lacks jurisdiction in this case.[251]

C. The Absence of Subject Matter Jurisdiction Cannot Be Waived

Consent in the context of this case is not effective for another reason. Whether a tribal court can hear cases not

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[250] Slip Op. at 45 n.141.

[251] This conclusion is also consistent with the Supreme Court's general view of the inherent authority tribal courts have over consenting nonmembers. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982) ("Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority. . . . Indian sovereignty is not conditioned on the assent of a nonmember."). Congress, through its plenary powers over Indian tribes, can always grant tribal courts the power to hear cases involving consenting nonmembers even outside of Indian country. Indeed, that is what Congress did in allowing "transfer jurisdiction" in ICWA. *See* 28 U.S.C. § 1911(b) (1994). But unless and until Congress speaks, we are bound by *Montana*'s "general rule" that " 'the inherent powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – 'do not extend to the activities of nonmembers of the tribe.' " *Strate*, 520 U.S. at 445-46 (quoting *Montana*, 450 U.S. at 565).

arising in Indian country between members and nonmembers is an issue of subject matter jurisdiction.[252] The majority recognizes this.[253] If, as I believe, the tribal court is not empowered to hear member versus nonmember cases because it lacks the power to do so, then it does not matter that the nonmember in this case consented to having the tribal court hear her case. The tribal court is still powerless to hear the case because the lack of subject matter jurisdiction cannot be waived.[254]

D. Tribal Court Jurisdiction Over Nonmembers Denies Access to State Courts on the Basis of an Unpermitted Racial Classification

Not only do tribes not have inherent power over nonmembers outside of Indian country, but even if such powers were mandated by Congress, the exercise of such power over nonmembers would be constitutionally suspect racial discrimination. This is a complicated subject. It is not critical here because of John's consent. But it is

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[252] *See Perry v. Newkirk*, 871 P.2d 1150, 1154 (Alaska 1994) (citations omitted) (noting that one definition of subject matter jurisdiction is "the power to render a judgment over that class of cases within which a particular one falls").

[253] *See* Slip Op. at 44-45 (emphasis added) ("Because the tribe only has *subject matter jurisdiction* over the internal disputes of tribal members, it has the authority to determine custody only of children who are members or eligible for membership.").

[254] *See Wanamaker v. Scott*, 788 P.2d 712, 713-14 n.2 (Alaska 1990) (because "a court which does not have subject matter jurisdiction is without power to decide a case, this issue cannot be waived, and can be raised at any point during the litigation").

likely to be raised in a variety of contexts in the future. In this dissent I will only highlight the issue by quoting from the Department of Justice's analysis of ICWA legislation when it was first drafted. It appears that the original version of ICWA did not provide for any type of parental veto over the choice of forum, as the law now does. This was a source of concern for the Department of Justice. Then-Assistant Attorney General, and now D.C. Circuit Judge, Patricia Wald, voiced these concerns in a letter to Representative Morris Udall, Chairman of the Committee on Interior and Insular Affairs:

> The [ICWA] bill would appear to subject family relations matters of certain classes of persons to the jurisdiction of tribal courts which are presently adjudicated in State courts. The bill would accomplish this result with regard to three distinct categories of persons. . . . One class would be members of a tribe. Another class would be nontribal members living on reservations, and a third would be nonmembers living off reservations. These three classes would be denied access to State courts for the adjudication of certain family relations matters unless "good cause" is shown under section 102(c) of the bill.
>
> The general constitutional question raised by [the bill] is whether the denial of access to State courts constitutes invidious racial discrimination violative of the fifth amendment. *See Bowling v. Sharp*, 347 U.S. 497 (1954).
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> . . . .
>
> [T]here is little support for the constitutionality of this bill as applied to nontribal members living on reservations and the rationale

> applied by the [Supreme] Court in [*Morton v. Mancari*, 417 U.S. 535 (1974) and *Fisher v. District Court*, 424 U.S. 382 (1976)], would not save the bill. The simple fact is that the parents of an Indian child may find their substantive rights altered by virtue of their Indian blood and the simple fact of residence on a reservation. The Court has never sanctioned such a racial classification which denied substantive rights, and we are unable to find any persuasive reason to suggest that it would do so.
>
> *Our conclusion with regard to nonmembers living on reservations is even more certain in the context of nonmembers living off reservations. In such a situation, we are firmly convinced that the Indian or possible non-Indian parent may not be invidiously discriminated against under the fifth amendment and that the provisions of this bill would do so.*[255]

IX. Court-developed Policy Arguments are an Inappropriate Basis Upon Which to Base Tribal Court Jurisdiction

The majority also reasons that the Northway tribal court should have jurisdiction in today's case based on the following rationale:

> Tribal jurisdiction over child custody cases involving member children will further the goal under both federal and state law of best serving the needs of Native American children. . . . [T]he fact that many of Alaska's Native villages are located far from the courtrooms of our state trial

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[255] H.R.Rep. No. 95-1386, at 35-38 (1978) (emphasis added), *reprinted in* 1978 U.S.C.C.A.N. 7558, 7560-61.

> courts limits our state judicial system's ability to respond to the needs of many Alaska Natives . . . . By acknowledging tribal jurisdiction, we enhance the opportunity for Native villages and the state to cooperate in the child custody arena by sharing resources. Recognizing the ability and power of tribes to resolve internal disputes in their own forums . . . can only help in the administration of justice for all.[256]

This statement is a commendable declaration of policy. But the fact that this statement *is* just that – a declaration of court-made policy – raises fundamental issues about judicial restraint, separation of powers, and the role of the judiciary.

In *Duro v. Reina*,[257] the Supreme Court held that a tribe's retained sovereignty did not include the authority to impose criminal sanctions on a nonmember Indian who had committed murder on the tribe's reservation. The Court made this holding despite a legitimate concern, voiced by a lower court, that to do so would create a "jurisdictional void" between federal and Indian crimes which might allow the defendant in this case to escape prosecution by either federal or Indian authorities.[258] The Supreme Court, with Justice Kennedy writing for the majority, was unswayed by these arguments, but referred to them in the concluding paragraph of the opinion:

> I the present jurisdictional scheme proves insufficient to meet the practical needs of

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[256] Slip Op. at 47-48.

[257] 495 U.S. 676 (1990).

[258] *Id.* at 683.

> reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs. *We cannot, however, accept these arguments of policy as a basis for finding tribal jurisdiction* that is inconsistent with precedent, history, and the equal treatment of Native American citizens.[259]

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[259] *Id.* at 698 (emphasis added). The Court in *DeCoteau* made a similar statement. Once the Court determined that the tribe's reservation had been terminated, and therefore the child custody case belonged in state court because it arose outside of Indian country, the *DeCoteau* Court declared that it would not entertain policy arguments on why removing tribal jurisdiction over custody matters would be harmful to the tribe:

> Until the Court of Appeals altered the status quo, South Dakota had exercised jurisdiction over the unallotted land of the former reservation for some 80 years. Counsel for the tribal members stated at oral argument that many of the Indians have resented state authority and suffered under it. Counsel for the state denied this and argued that an end to state jurisdiction would be calamitous for all the residents of the area, Indian and non-Indian alike. *These competing pleas are not for us to adjudge,* for our task [determining whether the former reservation had been terminated and therefore was not Indian country] is a narrow one.

420 U.S. at 449 (emphasis added).

We have similarly stated that, especially in areas where we lack institutional competence and authority, we should not make decisions based on policy rationales. *See Industrial Indem. Co. v. State,* 669 P.2d 561, 563 (Alaska 1983) ("[C]ourts must not intrude into realms of policy exceeding their institutional competence.").

In an interesting postscript to this case, Congress passed a statute almost immediately after the *Reina* decision that corrected the problem of the "jurisdictional void."[260] Thus, in that case, our system of separation of powers worked – the courts interpreted the law based on existing statutes and precedent, and Congress, persuaded by policy arguments that existing tribal jurisdictional schemes were inadequate, passed legislation to enhance tribal jurisdiction and rectify the problem.

Today, the majority attempts to short-circuit this system, by striking into an area – the expansion of tribal court jurisdiction based on policy arguments – that is solely the realm of Congress. If there is a need for out-of-Indian country tribal court jurisdiction in custody disputes between parents of Indian children, democratic processes are in place which can address this need. Alaska's Senators and Congressman are knowledgeable about and responsive to the needs of Alaska Natives. If there is a case to be made for expanded tribal court jurisdiction our Senators and Congressman are well-positioned to make an effective presentation. It is Congress, not this court, which is competent to decide what is needed and what limitations and protections are appropriate.

X. State Law Applies Outside Indian Country

The majority concludes that the tribal court may apply its own laws and customs in this case and implies that such tribal laws apply even if they conflict with state

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[260] *See Strate*, 520 U.S. at 446 n.5.

laws.[261] The majority implies, incorrectly, that this has always been the case.[262] But such a regime would be a radical departure from the past.[263] Nevertheless, the majority supports this conclusion by relying on *Santa Clara Pueblo v. Martinez*,[264] which held that tribes have the "power to make their own substantive law in internal matters, and to enforce that law in their own forums."[265] But *Santa Clara Pueblo* is inapplicable to this case. That case involved a member of the Santa Clara Pueblo tribe and her children, all of whom lived and were raised on the Santa Clara Reservation.[266] For that reason, the allocative principle favored tribal authority. By contrast, none of the events in the present case took place on reservation land or other Indian country, and therefore the allocative principle favors state authority. As I show below, the majority's conclusion ignores this important distinction and also conflicts with the purpose of P.L. 280 and its subsequent amendments.

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[261] Slip Op. at 50.

[262] *Id.* at 30, 31, 35-36.

[263] As the state has recently said: "[T]he long-standing jurisdictional regime and settled understanding in Alaska [is that] state laws apply to all Alaskans, without regard to the particular community in which they live." *See* Brief for Petitioner, *State of Alaska v. Native Village of Venetie*, 1997 WL 523883 at 93. *See generally* the "Historical Setting" discussion *supra* Dissent Part II.

[264] 436 U.S. 49 (1978).

[265] Slip Op. at 35-36 (quoting *Santa Clara Pueblo*, 436 U.S. at 55-56 (citations omitted)).

[266] *Santa Clara Pueblo*, 436 U.S. at 52.

A. Case Law

The discussion above in Part V of this dissent discusses the allocative principle in terms of whether the Northway tribal court or state court has jurisdiction in this case. This principle also applies to the determination of which law – state or tribal – applies to a given case regardless of which tribunal has jurisdiction. The plain language of the allocative principle makes this clear: "Absent express federal law to the contrary, Indians going beyond reservation boundaries *have generally been held subject to non-discriminatory state law* otherwise applicable to all citizens of the State."[267] This has always been the case in Alaska.[268] Thus, even if one assumes, as I do only for purposes of the discussion in this section, that the Northway court has jurisdiction in this case, it does *not* logically follow that tribal law controls. To the contrary, because this case arose outside of Indian country, the allocative principle requires the application of state, not tribal, law.

The argument, made by the majority, that the Supreme Court never contemplated applying the allocative principle to situations like those in Alaska where tribal membership has been separated from Indian country,[269] is incorrect. *Solem v. Bartlett* did just that.[270]

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[267] *Mescalero Apache Tribe*, 411 U.S. at 148-49 (string citations omitted) (emphasis added).

[268] *See supra* Dissent Part II.

[269] Slip Op. at 32.

[270] 465 U.S. at 468 (Court analyzing congressional act that, like ANCSA, "uncoupled reservation status [of the land] from Indian ownership.").

Moreover, the tribe in *DeCoteau* had lost its reservation in much the way those tribes that had reserves in Alaska did, by an act of Congress.[271] Yet the Supreme Court in *DeCoteau* confirmed the application of state law under the general allocative principle to a child custody case which involved tribal children residing within the boundaries of the former reservation but not in Indian country.[272] And, in *Venetie II*, the Supreme Court confirmed the application of this principle in its most recent Indian law case arising from Alaska.[273]

The Supreme Court also applied the allocative principle to Alaska Natives in *Organized Village of Kake*.[274] There the Court noted that Kake Natives had not "been provided with a reservation," and there was "no statutory authority under which the Secretary of Interior might permit [Kake] to operate fish traps contrary to state law."[275] Thus, the Court held that Alaska's fishing laws applied to the tribe.[276] The interest in continuing the traditional use of fish traps was strong given that the Kake Indian community was "entirely dependent upon salmon fishing."[277] Yet, this important interest had to give way to state law because the tribe did not reside on a reservation and no federal law expressly permitted it to ignore Alaska law. For similar reasons, because there is

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[271] 420 U.S. at 426-28.

[272] *Id.* at 427-28.

[273] *See* discussion *supra* Dissent Part V.A.

[274] 369 U.S. 60 (1962).

[275] *Id.* at 62.

[276] *Id.*

[277] *Id.* at 61.

no statute authorizing tribal courts to apply tribal law to child custody disputes not covered by ICWA and not arising in Indian country, tribal custody laws must give way to state law if they conflict.

The majority's decision allowing tribal law, outside of Indian country, to trump state law simply ignores *Kake, Mescalero Apache Tribe, DeCoteau, Solem, Venetie II,* and the other cases that establish the principle that Indians outside of Indian country are subject to state laws.

B. Section 4 of Public Law 280 Requires that the Laws Applied in Tribal Court Must be Consistent with State Law

The majority's decision is also mistaken because it ignores section 4(c) of P.L. 280. This section states:

> Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.[278]

The language of this statute is straightforward: In case of conflict between state and tribal law, P.L. 280 provides that state law governs.

To read this section as only applying to litigation in state courts would be erroneous because it would allow

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[278] 28 U.S.C. § 1360(c) (1994).

two sets of conflicting laws to govern the same transaction or occurrence. For example, state law prohibits custody preferences based on gender.[279] The laws of some tribes may be to the contrary. They may, for example, employ the "tender years" presumption rejected by state law.[280] As another example, state law provides that in a custody dispute between a parent and a non-parent, the parent is to be preferred absent a clear showing that parental custody will be harmful to the child.[281] The laws of some tribes may be different. And as a third example, state law provides for scheduled child support to be paid by an obligor parent.[282] Some tribes may not replicate this schedule.

If tribal laws provide for a particular custodial preference the litigant who will benefit by that preference will have a strong incentive to file in tribal court before his or her opponent files in state court. The reverse of course is also true. And if tribal courts are not bound by the state child support schedule and provide either lower child support or none at all, potential obligor parents will have a strong incentive to file their cases in tribal courts before potential obligees file in state court.

In my view, P.L. 280 clearly requires state law to govern in case of conflict between state and tribal law.

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[279] *See, e.g., Johnson v. Johnson*, 564 P.2d 71 (Alaska 1977).

[280] We have described the tender years presumption as follows: "[A] mother of young children will generally be given preference for custody if the other factors are evenly balanced." *Id.* at 73. We have expressly rejected this presumption. *Id.* at 75.

[281] *Turner v. Pannick*, 540 P.2d 1051 (Alaska 1975).

[282] *See* Alaska R. Civ. P. 90.3.

The majority holds otherwise. Thus state law can be circumvented if one litigant files in tribal court before the other files in state court. Congress, in enacting P.L. 280, found that Indians would be benefitted by the "extension of State civil jurisdiction to" Indian country.[283] With a goal of making Indians "truly first class citizen[s],"[284] Congress "deemed desirable" the extension to reservations "the substantive civil laws of the respective states insofar as those laws are of general application to private persons or private property. . . . "[285] It seems clear that the model Congress had in mind was that Indian country in P.L. 280 states would be governed by state laws of general application. By necessary implication, Congress must also have intended that state laws would govern outside of Indian country, and that there would not be, as the majority holds, sets of conflicting laws which can be selected by a litigant who wins a race to a courthouse.[286]

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[283] S.Rep. No. 699 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2411-12.

[284] *Id.* at 2411.

[285] *Id.* at 2412.

[286] In an adversarial system each party will attempt to use the law to his or her best advantage. If two sets of laws cover the same transaction or dispute, it is rational for each party to act in a way designed to ensure that the law more favorable to the party's position governs the case.

The majority assures us that "[a] tribe's inherent jurisdiction does not give tribal courts priority, or presumptive authority, in disputes involving tribal members." Slip Op. at 45. But the majority understates the breadth of its own holding. The holding of today's decision is that if a parent (Native or non-Native) of a child who is a tribal member or eligible for tribal membership, *see id.* at 44-45, files a custody dispute in tribal

C. The Rationale of *Erie v. Tompkins*

The majority's result also ignores the fundamental rationale of the landmark case, *Erie Railroad Co. v. Tompkins*.[287] *Erie* overruled *Swift v. Tyson*,[288] which held that federal courts, sitting in diversity, were not necessarily bound by the prior decisions of the courts of the states whose law was being applied. Rather, federal courts, in the interests of developing "general" federal law, could independently evaluate the state law at issue, even if that meant reaching a result different from that which a state court would reach.[289]

In *Erie*, the *Swift v. Tyson* doctrine was abandoned, in part, because it made "rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court" and it "had prevented uniformity in the administration of the law of the state."[290] Thus, *Erie*'s focus was on maintaining the uniformity of substantive law regardless of the forum chosen by the litigants. As Justice Frankfurter wrote in a

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court before state proceedings are initiated, the tribal court has jurisdiction over the case. State courts can only get involved after the tribal court's ruling through comity proceedings. In such circumstances, then, today's decision clearly *is* a grant of priority and presumptive authority to tribal courts.

[287] 304 U.S. 64 (1938). One Supreme Court Justice has called *Erie* "one of the most important cases at law in American legal history." Jack H. Friedenthal, Mary Kay Kane, & Arthur R. Miller, *Civil Procedure*, § 4.2 at 195 & n.3 (2d ed. 1993) (quoting Justice Black).

[288] 41 U.S. (16 Pet.) 1 (1842).

[289] *Swift*, 41 U.S. at 13.

[290] *Erie*, 304 U.S. at 74-75.

later case: "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by [a party to the dispute] in a federal court instead of in a State court a block away, should not lead to a substantially different result."[291]

The majority's decision allowing tribal law to trump state law *creates* the problem that *Erie* and its progeny sought to correct. When a marriage is breaking up, today's decision will create incentives for each party to the marriage to file first in the forum whose laws are thought to be more favorable. Again, it is very unlikely that Congress intended such a result, for it is difficult to see how any rational law-making authority could believe that it is desirable to permit conflicting laws to govern the same transaction.

XI. Conclusion

The majority's opinion today is very broad. (1) It holds that a tribe has jurisdiction to adjudicate child custody cases not arising in Indian country, contrary to the general principle that allocates functions between tribes and states, and contrary to two United States Supreme Court decisions which have stated that in custody cases tribal jurisdiction based on inherent sovereignty does not extend to cases not arising in Indian country. (2) In the face of many decades of contrary Supreme Court precedent, and without congressional authorization, it holds that Alaska Natives, outside of Indian country, are subject to tribal law, even if such laws

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[291] *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

conflict with those of the state. And (3) it gives tribal courts jurisdictional authority over *any* parent (tribal member or not, and Native Alaskan *or* not) of a child who is a tribal member or eligible for tribal membership.[292] Given the large number of Native Alaskans in the state[293] and the significant number of children born from marriages and relationships between Natives and non-Natives, the number of Alaskan citizens who will find themselves subject to mandatory tribal court jurisdiction is very large.[294]

Today's decision also raises many more troubling questions than it answers. I mention just a few.

(1) What type and kind of tribal court will be empowered to exercise the authority conferred by today's decision? The majority speaks about tribal courts as if they are all the same. They are not. Indeed, they are *markedly* different in terms of structure, size, expertise, and experience.[295] Sovereign status was extended, via the

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[292] Slip Op. at 44-45.

[293] *See supra* note 1.

[294] It should also be noted that many of the more than 30,000 ethnic Native Alaskans who do not live in Alaska, *see supra* note 1, may also be subject to tribal court jurisdiction in Alaska given the geographically limitless "membership sovereignty" theory recognized by the majority, and the unexplored parameters of personal jurisdiction in the context of village tribal court jurisdiction. *See* Slip Op. at 32-33, 54.

[295] *See Directory of Dispute Resolution In Alaska Outside Federal and State Courts*, Alaska Judicial Council, March 1999, at 29-102. Most villages perform mediation and quasi-judicial roles through their village council. The formation of courts as such is a recent development, but as of this writing twenty-three

Bureau of Indian Affairs Tribal Recognition List, to 226 Native entities in Alaska.[296] Will all such sovereigns exercise tribal court functions? Even those villages with populations of fewer than fifty people?[297]

(2) Tribal courts are not bound by the United States Constitution. As Justice Stevens noted in *Merrion v. Jicarilla Apache Tribe*, "Tribes may enforce discriminatory rules that would be intolerable in a non-Indian community. The equal protection components of the Fifth and Fourteenth Amendments, which limit federal or state authority, do not similarly limit tribal power."[298] What rules will apply to consenting nonmembers, or nonconsenting nonmembers?

(3) The Supreme Court has held that the powers "to tax,"[299] "to prescribe and enforce internal criminal laws," "to regulate domestic relations among members," and "to

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villages have done so. *Id.* at 11. A significant number of villages exercise no judicial or quasi-judicial functions. *Id.* at 12.

[296] *See supra* note 32.

[297] Joseph D. Matal, *A Revisionist History of Indian Country*, 14 Alaska L. Rev. 283, 349 n.517. Matal notes that there are many villages with fewer than fifty people and that four villages have populations of fewer than ten people. *Id.*

[298] 455 U.S. 130, 172 (1982) (Stevens, J., dissenting). The Indian Civil Rights Act imposes some, but not all, of the protections of the Bill of Rights on tribes. *See* 25 U.S.C. § 1302 (1994). But the Act is seemingly enforceable only by a writ of habeas corpus, which means that in cases not involving a detention of the person recognizable under the writ the Act may be unenforceable. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

[299] *Jicarilla Apache Tribe*, 455 U.S. at 137.

prescribe rules of inheritance for members,"[300] all derive from a tribe's inherent sovereign power. Today, the majority holds that the child custody component of the domestic relations power extends beyond Indian country. Does it logically follow from today's decision that tribal criminal and tort law will follow members outside of Indian country? Can a village council on the Tanana River exercise its sovereign powers to prescribe rules of inheritance for its members, including those who live in Anchorage or Los Angeles, or London? What are the geographical limits, if any, to the "membership sovereignty"[301] that the majority recognizes today? And what contacts suffice to give a tribal court personal jurisdiction?

(4) More Native Alaskans live in, or within easy driving distance of, cities served by superior courts than live in villages distant from superior courts.[302] And *many* Native Alaskans live very far from the villages with which they are associated. For example, about one-fifth (more than 20,000) of all resident Native Alaskans live in the Municipality of Anchorage.[303] By making these Native Alaskans subject to the jurisdiction of distant village tribal courts, will today's decision *create* the very problem the majority believes it is solving – namely, the problem of requiring Native Alaskans to travel long distances to have their custody disputes adjudicated? And

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[300] *Montana*, 450 U.S. at 564.

[301] Slip Op. at 32-33.

[302] Report of the Alaska Supreme Court Advisory Comm. on Fairness and Access, app. G (1997).

[303] *Alaska Population Overview: 1998 Estimates, Population Estimate by Race and Ethnicity*, 1 (Alaska Dep't of Labor).

will the interests of children born and raised, for example, in Anchorage be best served if their child custody cases take place in tribal courts in distant villages about which they know little or nothing? Indeed, will the interests of Native children, no matter where they reside, be best served if their non-custodial parents are allowed by a tribal court order to pay child support that is significantly less than they would pay under Alaska Civil Rule 90.3?

I do not know the answers to these questions. One thing that I am sure of, however, is that the ramifications of this case will be felt for many years. Confusion and litigation will proliferate as state and tribal courts try to work out the consequences of this opinion.

Finally, it is important to note what this case is ultimately about – the balance of tribal and state power within Alaska. As Chief Justice Rehnquist stated in *Washington v. Confederated Tribes of the Colville Indian Reservation*, "[a]t issue here is not only Indian sovereignty, but also necessarily state sovereignty as well."[304] The plenary power of the state under the Alaska Constitution is asserted by a system of uniform laws applied equally to all citizens, and by state courts which "shall constitute a unified judicial system. . . . "[305] The result in this case cannot pass muster under the Alaska Constitution unless mandated by federal law. Reduced to its essence the question here is whether under the circumstances of this

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[304] 447 U.S. 134, 181 (1980) (Rehnquist, J., concurring in part).

[305] Alaska Const. art. IV, § 1.

case the laws of the United States require that the plenary power of the state give way to tribal power. The answer given by the majority is "yes." Appropriate regard for the Alaska Constitution requires that such an answer not be given unless there are federal laws which require a cession of state authority. Because such laws do not exist, I respectfully dissent.

ADDENDUM: P.L. 280 HISTORY AND ANALYSIS

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I. P.L. 280: Introduction

After briefly discussing Public Law (P.L.) 280 and *Native Village of Nenana v. State, Department of Health & Social Services*,[1] the majority concludes that "it is neither necessary nor appropriate at this time to reach the question of whether *Nenana* and its progeny were wrongly

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[1] 722 P.2d 219 (Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986).

decided."[2] The majority then notes that its decision today "creates a disjunction in Indian law jurisprudence" because it leaves tribes without Indian country with greater powers than those with Indian country.[3] Because the appellant and amici urge us to overrule the *Nenana* line of cases and because I believe that courts, including this one, will soon be required to address the disjunction mentioned by the majority, I set forth my views on this issue. For the reasons outlined below, I continue to believe *Nenana* properly held that P.L. 280 granted states exclusive jurisdiction in child custody matters.

A. P.L. 280 and Amendments

P.L. 280 was enacted in 1953[4] and amended in 1958[5] and 1970.[6] Because sections of P.L. 280 are interrelated, I have set out the text of the act in the margin.[7]

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[2] Slip Op. at 17.

[3] *Id.* at 17 n.44.

[4] Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

[5] Act of August 8, 1958, Pub. L. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

[6] Act of November 25, 1970, Pub. L. 91-523, 84 Stat. 1358 (codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360).

[7] The relevant text of P.L. 280 as enacted in 1953 is set out below with subsequent amendments. The 1958 amendments are redlined while the 1970 amendments are crossed out and capitalized. All amendments are followed by the date of the amendment.

P.L. 280 conferred criminal and civil jurisdiction on five "mandatory" states: California, Minnesota,

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§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States (or Territories [8/8/58])* listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State (or Territory [8/8/58]) to the same extent that such State (or Territory [8/8/58]) has jurisdiction over offenses committed elsewhere within the State (or Territory [8/8/58]), and the criminal laws of such State (or Territory [8/8/58]) shall have the same force and effect within such Indian country as they have elsewhere within the State (or Territory [8/8/58]):

State (or Territory [8/8/58])	of *Indian country affected*
(~~Alaska~~	~~All Indian country within the Territory [8/8/58]~~) [11/25/70]
ALASKA	ALL INDIAN COUNTRY WITHIN THE STATE, EXCEPT THAT ON ANNETTE ISLANDS, THE METLAKATLA INDIAN COMMUNITY MAY EXERCISE JURISDICTION OVER OFFENSES COMMITTED BY INDIANS IN THE SAME MANNER IN WHICH SUCH JURISDICTION MAY BE EXERCISED BY INDIAN TRIBES IN INDIAN COUNTRY OVER WHICH STATE JURISDICTION HAS NOT BEEN EXTENDED. [11/25/70]
California	All Indian country within the State.

* Parenthetical material highlighted in original.

Nebraska, Oregon, and Wisconsin.[8] Section 2, the criminal portion, provided that each state would have

> jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such

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Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State, except the Menominee Reservation.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section AS AREAS OVER WHICH THE SEVERAL STATES HAVE EXCLUSIVE JURISDICTION. [11/25/70]

[8] Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588.

> State shall have the same force and effect within such Indian country as they have elsewhere within the State.[9]

Section 4 conferred civil jurisdiction:

> Each of the States listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed. . . . [10]

Section 4 also provided that state civil laws of general application should apply in Indian country as they do elsewhere:

> those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State. . . . [11]

Important provisos were added by subsections (b) and (c) of section 4. Subsection (b) emphasized that alienation or taxation of trust or restricted property was not authorized.[12] Under subsection (c), tribal ordinances or customs were to be given effect in the adjudication of civil cases "if not inconsistent with any applicable civil law of the State. . . . "[13]

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

Comprehensive congressional reports accompanied P.L. 280. The essence of the legislative history is contained in three paragraphs in the Report of the House Committee on Interior and Insular Affairs, which was subsequently incorporated into the Senate Report:

> Need for such legislation on a general, rather than limited basis is grounded on the following: These States lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country, with limited exceptions. The applicability of Federal criminal laws in States having Indian reservations is also limited. The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called 10 major crimes: murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny.
>
> As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.
>
> Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State

> civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable.[14]

In 1958, P.L. 85-615 extended both the criminal and civil provisions of P.L. 280 to "all Indian country" within Alaska.[15] Three paragraphs from the Report of the Senate Committee on Interior and Insular Affairs distill the reasons for this amendment:

> One of the needs for the enactment of the proposed legislation is due to a decision of the United States District Court for the District of Alaska in the cases of *In re McCord* (No. A-13,363) and *In re Nickanorka* (No. A-13,364), wherein the defendants were charged with statutory rape under the Territorial law of Alaska. The court held (1) that the Territorial law did not apply because the incident occurred in Indian country and (2) that the Federal law mentioned above and popularly referred to as the Ten Major Crimes Act (18 U.S.C. 1153) did not apply because statutory rape is not included

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[14] S. Rep. No. 83-699 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2411-12. The report begins with a lengthy explanation of the committee's general aims reflected in numerous pieces of legislation during the session: "withdrawal of Federal responsibility for Indian affairs wherever practicable, and . . . termination of the subjection of Indians to Federal laws applicable to Indians as such." *Id.* at 2409.

[15] Act of August 8, 1958, Pub. L. 85-615, 72 Stat. 545.

in the Federal crime of rape. The defendants were therefore released.

In construing the Federal statute the court also decided that the native village of Tyonek, Alaska, where the rape occurred, came within the definition of Indian country. Such a construction affects a large number of other native villages in Alaska similarly situated. The committee has been advised that these native villages do not have adequate machinery for enforcing law and order. They have no tribal court, no police, no criminal code, and in many instances no formal organization. This is for the reason that the Territorial government in Alaska has maintained law and order in the native villages as well as in the rest of Alaska and the native tribal councils have had no reason to nor have they ever exercised these functions. Since the natives are not prepared to take over these activities, the recent court decision has left the villages and the people without protection. The instant legislation seeks to remedy this situation by restoring what, until the court decision, was the actual practice in the enforcement of the law in the Indian country in Alaska.

The bill also extends the Territorial law of Alaska to Indian country with regard to civil matters. This action is consistent with previous enactments of Congress, as in the case of Public Law 280, 83d Congress, whereby criminal and civil jurisdiction over Indian country within the States of California, Minnesota, Nebraska, Oregon, and Wisconsin was transferred to those States.[16]

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[16] S. Rep. No. 85-1872 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3347, 3348.

In 1970 Congress again amended P.L. 280 by enacting P.L. 91-523. P.L. 91-523 excepted the Metlakatla Indian community from the area of Indian country subject to the exclusive criminal jurisdiction of Alaska, changing 18 U.S.C. § 1162(a) (section 2 of P.L. 280).[17] And it described the Indian country subject to the criminal jurisdiction of the mandatory states as "areas over which the several States have *exclusive* jurisdiction."[18]

The legislative history of the 1970 amendment is extensive and I will discuss it at some length later in this addendum.[19] It suffices for purposes of this introduction to quote the one sentence "Purpose" section of the House Report:

> The purpose of the proposed legislation is to amend section 1162 of title 18, United States Code, by adding language permitting the Metlakatla Indian community on the Annette Islands in Alaska to exercise jurisdiction over minor offenses concurrent with the State of Alaska.[20]

B. The Supreme Court and P.L. 280

In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*,[21] the Supreme Court declined to

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[17] Act of November 25, 1970, Pub. L. 91-523, 84 Stat. 1358.

[18] *Id.* (emphasis added).

[19] *See infra* Dissent Addendum Part II.A.

[20] H.R. Rep. No. 91-1545 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4783, 4783.

[21] 439 U.S. 463 (1979).

address the question of whether P.L. 280 conferred exclusive or concurrent jurisdiction on the states.[22] Nevertheless, the Court has made statements suggestive of exclusive state jurisdiction. For example, in *Yakima Indian Nation*, the state of Washington enacted a law whereby it assumed "[f]ull criminal and civil jurisdiction to the extent permitted by Pub. L. 280" but which only "extended to all fee lands in every Indian reservation and to trust and allotted lands therein when non-Indians were involved."[23] In analyzing the effect of this statute, the Court stated that "[s]tate jurisdiction is *complete* as to all non-Indians on reservations and is also *complete* as to Indians on nontrust lands [on the reservation]."[24]

Earlier, in *Organized Village of Kake v. Egan*,[25] the Supreme Court apparently endorsed the view that P.L. 280 granted exclusive jurisdiction to the states:

> In 1953 Congress *granted to several States full civil and criminal jurisdiction over Indian reservations*, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future. 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360. Alaska was added to the list of such States in 1958, 72 Stat. 545. This statute disclaims the intention to permit States to interfere with federally granted fishing privileges or uses of property.[26]

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[22] *Id.* at 488-89 n.32.

[23] *Id.* at 475.

[24] *Id.* at 498 (emphasis added).

[25] 369 U.S. 60 (1962).

[26] *Id.* at 74 (emphasis added).

The words "complete" in *Yakima Indian Nation* and "full" in *Kake* are terms most logically associated with exclusive, rather than concurrent, jurisdiction.

Further, in *Solem v. Bartlett*,[27] the court strongly implied that state criminal jurisdiction is exclusive, rather than concurrent, with tribal jurisdiction, stating that: "[Within Indian country] Tribes exercise concurrent jurisdiction over certain minor crimes by Indians, 18 U.S.C. § 1152, 1153, *unless a State has assumed jurisdiction under § 1162* [P.L. 280 § 2]."[28]

The Court also addressed the extent of state civil jurisdiction under P.L. 280 in *Bryan v. Itasca County*[29] and *California v. Cabazon Band of Mission Indians*.[30] According to the Court, section 4 of P.L. 280 was "primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians."[31] The Court stated clearly that this jurisdiction did not include the power to tax or "general civil regulatory authority"; however, section 4 of P.L. 280 did "grant States jurisdiction over private civil litigation involving reservation Indians in state court[s]."[32] Authority over private civil litigation is the issue in the present case.

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[27] 465 U.S. 463 (1984).

[28] *Id.* at 465 n.2 (emphasis added).

[29] 426 U.S. 373 (1976).

[30] 480 U.S. 202 (1987).

[31] *Bryan*, 426 U.S. at 383.

[32] *Cabazon Band of Mission Indians*, 480 U.S. at 208 (citing *Bryan*, 426 U.S. at 385, 388-90).

II. P.L. 280 As Amended Conferred Exclusive Jurisdiction

In *Native Village of Nenana v. State, Department of Health & Social Services*,[33] we held that P.L. 280 grants Alaska exclusive jurisdiction to adjudicate cases involving the custody of Native children.[34] The issue arose in the context of a child-in-need-of-aid proceeding in which the village of *Nenana* sought to transfer jurisdiction from the state court under the Indian Child Welfare Act.[35] Under section 1918(a) of that act, "any Indian tribe which became subject to State jurisdiction pursuant to" P.L. 280 "may reassume jurisdiction over child custody proceedings."[36] However, reassumption is permitted only if the tribe presents "a suitable plan to exercise such jurisdiction" to the Secretary of the Interior and the Secretary approves the plan.[37] No reassumption plan had been approved for *Nenana*,[38] but *Nenana* argued that this was unnecessary because P.L. 280 did not preempt its jurisdiction and that it continued to have concurrent jurisdiction with the state over children's matters. We rejected this contention and concluded that "Congress intended that Public Law 280 give certain states, including Alaska,

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[33] 722 P.2d 219 (Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986).

[34] *Id.* at 221.

[35] *Id.* at 220.

[36] *Id.* at 221 (citing 25 U.S.C. § 1918(a)).

[37] 25 U.S.C. § 1918(a).

[38] *Nenana*, 722 P.2d at 221.

exclusive jurisdiction. . . . "[39] We followed *Nenana* in *In re K.E.*[40] and *In re F.P.*[41]

I believe *Nenana*, *K.E.* and *F.P.* were correctly decided. Congress in 1970 explicitly described the Indian country subject to state jurisdiction under P.L. 280 "as areas over which the several States have exclusive jurisdiction."[42] The 1970 amendment was consistent with the prior text of P.L. 280 which the Department of the Interior interpreted as bestowing exclusive jurisdiction on the states.[43]

A. The 1970 Amendment to P.L. 280

In 1970 Congress enacted P.L. 91-523, which amended the codification of P.L. 280 set out in 18 U.S.C. § 1162.[44] The area of Indian country in which the State of Alaska was granted criminal jurisdiction was changed in section 1 from "all Indian country" to "[a]ll Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended."[45] This language contrasts with the exceptions for reservations pertaining to other states in

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[39] *Id.*

[40] 744 P.2d 1173, 1174 (Alaska 1987).

[41] 843 P.2d 1214, 1215 (Alaska 1992).

[42] Act of November 25, 1970, Pub. L. 91-523, 84 Stat. 1358.

[43] *See infra* Dissent Addendum Part II.B.

[44] Act of November 25, 1970, Pub. L. 91-523, 84 Stat. 1358.

[45] *Id.*

section 2 of P.L. 280. For example, in Minnesota the Indian country affected is "all Indian country within the State, except the Red Lake Reservation."[46] The reason for the difference was well considered. On excepted reservations, such as Red Lake, the writ of state law under P.L. 280 did not run. With respect to Metlakatla, Congress intended that state law would continue to apply but that the Metlakatla Indian community would have concurrent jurisdiction over those offenses committed by Indians which would be within the jurisdiction of tribes located in areas where P.L. 280 does not apply.

This amendment is important because it recognizes that the Metlakatla community lacked concurrent jurisdiction prior to the amendment. This, in turn, represents a recognition of pre-amendment exclusive jurisdiction in the state. Although the amendment affected only criminal jurisdiction, the language of section 2 of P.L. 280, conferring criminal jurisdiction on the states, and section 4 of P.L. 280, conferring civil jurisdiction on the states, is parallel. Section 2(a) provides: "Each of the States listed in the following table shall have jurisdiction over offenses . . . to the same extent that such State has jurisdiction over offenses committed elsewhere within the State."[47] The language of section 4(a) is: "Each of the States listed in the following table shall have jurisdiction over civil causes of action . . . to the same extent that such State has jurisdiction over other civil causes of action. . . . "[48] In view of these similarities it is impossible to conclude that

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[46] *Id.*

[47] Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588.

[48] *Id.*

Congress intended to confer on the states exclusive criminal jurisdiction, but only concurrent civil jurisdiction. Indeed, the Department of the Interior reported to Congress with respect to the 1970 amendment that P.L. 280, when made applicable to Alaska, "acted to *remove*, with limited exceptions, the *civil and criminal* jurisdiction for law and order purposes previously held by the Indian and native groups and the Federal Government."[49] The first section of the 1970 amendment thus reflected Congress's belief that P.L. 280, as applied to Alaska, granted exclusive jurisdiction to the state.

Section 2 of the 1970 amendment reflects more than merely a belief of Congress:

> Subsection (c) of section 1162 of title 18 United States Code, is amended to read as follows: "(c) The provisions of section 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have *exclusive jurisdiction.*"[50]

Prior to this amendment, subsection (c) of section 1162, a part of section 2 of P.L. 280, provided: "The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."[51] U.S.C. § 1152 extends the criminal laws of the United States to Indian country but

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[49] H.R. Rep. No. 91-1545 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4783, 4786 (emphasis added).

[50] Act of November 25, 1970, Pub. L. 91-523, 84 Stat. 1358 (emphasis added).

[51] Act of August 15, 1953, Pub. L. 83-280, 67 Stat. 588.

does not apply to offenses committed by one Indian against another. U.S.C. § 1153 is the so-called Major Crimes Act which extends the criminal law of the United States to major felonies committed by one Indian against another in Indian country. Section 2 of the 1970 amendment was necessary because under section 1 Metlakatla remained Indian country covered by P.L. 280. But Congress wanted the Indian community to have concurrent jurisdiction with the state in that area. Congress therefore chose to define the remaining Indian country in Alaska covered by P.L. 280 and all Indian country in the other five states, except for the excepted reservations, as "areas over which the several States have *exclusive* jurisdiction."[52]

This language is more than merely an expression of Congress's belief that P.L. 280 granted exclusive jurisdiction to the states; it ratifies that belief. It cannot be dismissed as merely the opinion of a later Congress concerning the meaning of a law passed by an earlier Congress. The later Congress changed the original act's language to both reflect and enact its belief. As such, P.L. 280 read in conjunction with its 1970 amendment more than adequately rebuts the presumption favoring tribal jurisdiction in Indian country because "Congress has expressly provided that State laws shall apply."[53]

The 1970 amendment's importance should not be dismissed as merely the view of a subsequent Congress

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[52] Act of November 25, 1970, Pub. L. 91-523, 84 Stat 1358 (emphasis added).

[53] *Bryan*, 426 U.S. at 376 n.2 (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71 (1973)).

regarding the intent of an earlier one. In *United States v. Philadelphia National Bank*[54] and *South Dakota v. Yankton Sioux Tribe*[55] the Supreme Court observed that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[56] The references in *Yankton Sioux* and *Philadelphia National Bank* were not amendatory to previous acts of Congress and are thus distinguishable from the present case. Moreover, in *Bryan*, a case that actually focuses on interpreting P.L. 280, the Supreme Court observed that "intervening" acts of Congress that are "intimately related" to jurisdictional issues of Indian law *should* be considered:

> Title IV of the 1968 Act is intimately related to § 4, as it provides the method for further state assumptions of the jurisdiction conferred by § 4, and *we previously have construed the effect of legislation affecting reservation Indians in light of "intervening" legislative enactments.*[57]

There is no question that P.L. 91-523, the 1970 amendment, is "intimately related" to P.L. 85-615, the 1958 amendment that added Alaska to P.L. 280. Its unambiguous purpose was to modify the 1958 amendment. As such, the 1970 amendment is particularly probative of Congress's intent in enacting P.L. 85-615.

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[54] 374 U.S. 321 (1963).

[55] 118 S.Ct. 789 (1998).

[56] *Id.* at 803 (quoting *Philadelphia Nat'l Bank*, 374 U.S. at 348-49).

[57] *Bryan* 426 U.S. at 386 (emphasis added) (citation omitted).

B. Contemporaneous Administrative Construction

In determining a statute's meaning, courts will defer to the contemporaneous construction of the statute given by an agency charged with its administration.[58] Contemporaneity of construction is important because often agency personnel have assisted in formulating the legislation and are thus knowledgeable of its intent and meaning.[59] Interpretations which contradict contemporaneous interpretations, on the other hand, are entitled to little weight.[60]

These principles apply to this case because the Department of the Interior, contemporaneously with the

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[58] *See Totemoff v. State*, 905 P.2d 954, 967-68 (Alaska 1995).

[59] *See Howe v. Smith*, 452 U.S. 473, 485 (1981) ("the [agency's] interpretation of the statute merits greater than normal weight because it was the [agency] that drafted the legislation and steered it through Congress with little debate"). *See also Frontier Airlines, Inc. v. Civil Aeronautics Bd.*, 621 F.2d 369, 372 (10th Cir. 1980) (holding that the construction of a statute by an agency charged with its administration is entitled to substantial deference by courts, especially where the administrative practice at stake involves the contemporaneous construction of the statute by those charged with the responsibility of setting its machinery in motion); 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.04 at 11 (5th ed. 1992) ("[L]egislative history in the form of information as to how draftsmen of a provision understood it and that their meaning was communicated to the Congress which enacted it has been held to be entitled to greater weight than subsequent administrative interpretation.") (citation omitted).

[60] *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 142-46 (1976) (declining to defer to agency interpretation which contradicted previous, longstanding interpretation and following earlier interpretation); *Totemoff*, 905 P.2d at 967-68.

passage of P.L. 280 and for a long period of time thereafter, interpreted P.L. 280 as conferring exclusive jurisdiction on the states. A 1954 departmental opinion explained that P.L. 280 conferred exclusive criminal jurisdiction on the states.[61] This confirmed an earlier departmental interpretation that the jurisdiction conferred by P.L. 280 was exclusive and which gave the following textual analysis for that conclusion:

> Although there has been no interpretation of the act of August 15, 1953 (Public Law 280 – 83d Cong.), by the Federal courts, *it is our view that the act*, by providing that the State shall have jurisdiction over crimes and offenses committed by or against Indians in the Indian country *to the same extent* that the State has jurisdiction over crimes and offenses committed elsewhere within the State, except as limited in Section 2(b), *made such jurisdiction of the State exclusive. The extent of the State's jurisdiction is full and complete* and permits of no such jurisdiction by any other body save the Federal Government and subordinate agencies of the State itself. The act also explicitly states that the criminal laws shall have the same force and effect within Indian country as they have elsewhere within the State. The effect of this provision clearly is to extend both the substantive and procedural laws of the State to crimes committed by Indians. Thus, State law

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[61] Op. Solic. Dep't Interior, No. M-36241 (Sept. 22, 1954), *reprinted in* II U.S. Dep't of Interior, Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974, 1648, at 1648 (1979) ("Criminal jurisdiction conferred upon a state by 18 U.S.C. 1162 is exclusive except as against the United States.").

> defines not only the criminal offenses against the State and the penalties therefor, but it also defines the courts in which and the manner in which persons accused of committing such offenses are to be tried.[62]

These contemporaneous interpretations of exclusivity were published and thus known to Congress when it extended P.L. 280 to Alaska in 1958. As they were not addressed or changed, they were presumably approved by the 1958 Congress.[63] The Senate Report accompanying the 1958 amendment states that under P.L. 280 "criminal and civil jurisdiction over Indian country within [the five

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[62] *Id.* at 1650 n.4 (first and third emphasis added); Op. Solic. Dep't Interior No. M-36907 (November 14, 1978), 85 I.D. 433, 435 (1978) (quoting June 4, 1954 letter from Assistant Secretary of the Interior Lewis to Mr. Morgan E. Pryse, Area Director, Bureau of Indian Affairs, Minneapolis, Minnesota (June 4, 1954)).

[63] *See Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (in "some circumstances, Congress' failure to repeal or revise in the face of [an] administrative interpretation has been held to constitute persuasive evidence that that interpretation is the one intended by Congress."). *See also* 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.05 at 19 (5th ed. 1992) ("If the legislature has amended portions of the statute, but left intact the portion sought to be construed, the legislature has declared an intent to adopt the construction placed on the statute by the administrative agency.") (citation omitted). *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983) ("In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the [agency's] rulings. . . . "); *Casperson v. Alaska Teachers' Retirement Bd.*, 664 P.2d 583, 585 (Alaska 1983) ("we must assume that the legislature was conscious of what it was doing when it amended the statute in 1970, but left [a related statute] unchanged.").

mandatory states] was *transferred* to those States."[64] As the primary meaning of "transfer" in this context is the conveyance of authority from one entity to another,[65] the report suggests that the committee agreed with the Department's view that the state's jurisdiction was exclusive.

The Department continued to interpret P.L. 280 as vesting exclusive jurisdiction in the states into the 1970's. I have previously discussed the 1970 amendment to P.L. 280.[66] The House Report regarding the 1970 amendment indicates a shared assumption by Commissioner Bruce of the Department of the Interior's Bureau of Indian Affairs and the House Judiciary Committee that P.L. 280 as applied to Alaska effectively eliminated all tribal jurisdiction over minor offenses. The report states that Metlakatla originally

> had jurisdiction over minor criminal offenses under its federally recognized government. However, when the act of August 8, 1958 [applying P.L. 280 to Alaska] was passed giving Alaska jurisdiction over offenses by or against Indians in all Indian country within the Territory of Alaska, *it had the effect of eliminating* the legal basis for the jurisdiction exercised by the community over minor offenses. As Commissioner Bruce stated at the hearing, enactment of the bill would reinvest the Metlakatla Community Council with local legislative authority and

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[64] S. Rep. No. 85-1872 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3347, 3348 (emphasis added).

[65] *Webster's Third New Int'l Dictionary* 2426-27 (1966).

[66] *See supra* Dissent Addendum II.A.

> police powers to enforce its laws over minor criminal offenses concurrently with the State.[67]

A letter written by Undersecretary of the Interior Russell to the Senate Committee on the Judiciary concerning the 1970 amendment clarifies the Department's position on the transfer of exclusive jurisdiction and makes it clearly applicable to the civil as well as the criminal sections of P.L. 280:

> Since 1958, the State of Alaska has had the responsibility for providing law and order services to Indians in the Indian country within its borders. *The transfer of such jurisdiction to Alaska acted to remove, with limited exceptions, the civil and criminal jurisdiction for law and order purposes previously held by the Indian and native groups and the Federal Government.* This bill would reinvest the Metlakatla Community Council with local legislative authority and police powers to enforce its law over minor criminal offenses concurrently with the State.[68]

By 1978 the Department had changed its views. It began to regard P.L. 280 as a grant of concurrent jurisdiction to the state.[69] In 1991 the Ninth Circuit adopted the same position.[70]

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[67] H.R. Rep. No. 91-1545 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4783, 4784 (emphasis added).

[68] *Id.* at 4786 (emphasis added).

[69] *See* Op. Solic. Dep't Interior, No. M-36907 (Nov. 14, 1978), 85 I.D. 433, 434-37 (1978).

[70] *Native Village of Venetie, I.R.A. Council v. Alaska*, 944 F.2d 548, 561-62 (9th Cir. 1991).

I do not believe that P.L. 280 was designed to terminate Indian reservations or to eliminate all tribal authority. Tribal power granted by federal law over fish and game and trust property is specifically preserved under sections 2 and 4 of that act. But P.L. 280 was enacted in the heyday of what one authority has described as "the termination era" of 1945-1961.[71] By contrast, the 1970's were part of a different trend in Indian law, "the self-determination era."[72] This period is "characterized by expanded recognition and application of the powers of tribal self-government, and by the general exclusion of reservations from state authority."[73] The 1978 departmental opinion should, therefore, be seen as consistent with the trends of the period during which it was issued. However, the earlier departmental opinions – those contemporaneous with the passage of P.L. 280 and its 1958 and 1970 amendments – were obviously more in tune with the Congresses which enacted and amended P.L. 280. As such, it is these departmental opinions which require our deference, not the later departmental opinions that contradict the contemporaneous interpretations of P.L. 280.[74]

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[71] American Indian Lawyer Training Program, Inc., *Indian Tribes as Sovereign Governments* 11 (1988).

[72] *Id.* at 14.

[73] *Id.*

[74] *See General Elec.*, 429 U.S. at 142-46; *Totemoff*, 905 P.2d at 967-68.

III. Conclusion

Congress in 1970 explicitly described the Indian country subject to state jurisdiction under P.L. 280 "as areas over which the several States have exclusive jurisdiction."[75] This enactment was consistent with the text and the contemporaneous and long-standing interpretation of P.L. 280 by the Department of the Interior that the act bestowed exclusive jurisdiction on the states. For these reasons, I believe that Congress intended P.L. 280 as a grant of exclusive jurisdiction to the states. Accordingly, our decisions in *Nenana, K.E.*, and *F.P.* were correct.

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[75] Act of November 25, 1970, Pub. L. 91-523, 84 Stat. 1358.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

JOHN BAKER, Plaintiff,	)	4FA-95-3103 Civil
v.	)	
ANITA JOHN, Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Before the Court is a custody dispute between plaintiff, John Baker, and defendant, Anita John, the two biological parents of John "JJ" Malone Baker II, born July 31, 1991, and Emmanuel Kenneth Baker, born July 30, 1992.

The parties have never married.

Trial took place on March 27, 1997. Both parties testified as did the child custody investigator. The child custody investigation was completed approximately a year before trial and did not address events that occurred since. At issue herein is legal and physical custody, visitation arrangement, and child support, both past and future.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The parties hereto are the biological parents of John and Emmanuel Baker. Each of the parties has acted in a parental role for the children at some time during the childrens' lives.

2. At the time the parties first child was born, Ms. John was quite young and had lived a sad and tragic life. Ms. John was raised in Mentasta. Mr. Baker is eleven years older than Ms. John. He was raised in Northway.

3. The parties children lived with both of their biological parents from the time the children were born until some time in the fall of 1993 when the parties separated permanently. Thereafter, the children resided primarily with Ms. John until September of 1995. There were periods during this time frame when the children spent some time with Mr. Baker as the parties broke up and got back together on several occasions. During this time frame, the parties were able to cooperate with regard to exchanges of the children. This however stopped in the summer of 1995 when the parties sought guidance from the Northway Tribal Council. Beginning in September of 1995, after an order by the Northway Tribal Council, the parties were given joint custody of the children and visitation alternated between the parties on a month-to-month basis. Since January of 1996, the children have lived primarily with Mr. Baker.

4. Each of the parties has, in the past, demonstrated significant substance abuse problems. Mr. Baker appears to have addressed his substance abuse problems and has been sober since December of 1995 with the exception of three relapses. His last relapse was in August of 1996. Mr.

Baker does not drink when the children are present. There however continues to be a legitimate concern about the possibility for future relapses. Ms. John has not successfully addressed her substance abuse problems and continues to drink. Ms. John drinks every couple of weeks and always drinks until she blacks out. Ms. John drinks when the children are around. While the parties are under the influence of alcohol, their parenting skills are compromised, the children are at risk, and the parents are unable to get along with one another. It is therefore critical that each party address and resolve their substance abuse issues. If Ms. John does not stop drinking alcohol, her mental and physical health is in serious danger!

The parties also both have anger problems and each would benefit from anger management counseling. Mr. Baker's anger contributed to the breakdown of the parties relationship and Ms. John's anger appears to have interfered with Ms. John's relationship with her oldest son.

Ms. John has also experienced serious bouts of depression with suicidal components. Although she has apparently stabilized, she requires mental health counseling.

Ms. John was recently in a relationship with another man in which there were some domestic violence issues. It is critical that Ms. John involve herself in healthy relationships both for her sake and for the sake of her children.

5. Since January of 1996, Mr. Baker has had primary custody of the children. During the month of March 1996, Ms. John had custody of the children for eleven days after

which she requested that Mr. Baker come and get them. Since this time Ms. John has visited with the children on roughly five occasions for up to three days in length. Mr. Baker lives in Northway and Ms. John lives in Mentasta. The two communities are roughly ninety miles apart and a two hour drive.

6. The children are currently going to school in Northway. John attends first grade and Emmanuel attends preschool in the afternoons. The children are significantly impacted by the current situation between their parents and would naturally prefer open and frequent access to both of their parents. It is critical for the mental health of the children that they not be manipulated by the parties and be permitted open access to both parents.

7. The children are presently doing reasonably well living with their father in Northway. Ms. John has visited with the children sporadically and apparently gets along well with her youngest son. Ms. Johns relationship is not as good with the older child who she has a difficult time controlling and who tends to make her angry. There remains however a strong bond of Love and affection between Ms. John and both of her sons. Ms. John would benefit from parenting classes.

8. Ms. John has been candid with officials with regard to her substance abuse and mental health problems and has returned the children to Mr. Baker when she was concerned that these problems might impact the children.

9. Over the years neither party has paid the other child support.

10. Mr. Baker seeks full legal and physical custody of the children. Ms. John requests shared legal custody and a physical custody arrangement that would allow each parent equal access to the children. Both parties agree that the Northway Tribal council can mediate any custody disputes that arise in the future.

11. A.S. 25.20.060(c) provides that the Court may award shared custody to both parents if shared custody is determined to be in the best interest of the children. The legislature concluded that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing. Further, it was the legislative intent that both parents have the opportunity to guide and nurture their children and to meet the needs of the child on an equal footing beyond consideration of support or actual custody.

In the instant case Ms. John is intimidated by Mr. Baker and has not been able to communicate with him openly. This is a concern for as the childrens biological mother Ms. John should have a significant role in the childrens lives. On the other hand Ms. John's current alcohol problem, her depression and involvement in dysfunctional relationships compromises her ability to provide consistent and safe care for the children. Therefore the Court will, for the short term, award full legal custody of the children to Mr. Baker. Once Ms. Johns is able to demonstrate her sobriety and stability this issue can be again addressed and reconsidered.

12. A.S. 25.20.060 provides that when the physical custody of children is in dispute the Court shall determine physical custody based on the best interest of the

child. In determining what is in the best interest of the child the Court shall consider all relevant factors including those enumerated in A.S. 25.24.150(c).

With regard to the statutory factors set forth in A.S. 25.24.150 there are some concerns. Both parents love the children and both desire what is in the childrens best interest. Both have provided a home for the children in the past and both seem reasonably capable of proving for the physical and emotional needs of the children. Further both boys love their parents and need a close relationship with both mother and father. While both parents have been willing to allow the other access to the children Mr. Baker seems more reluctant to do so. It is critical however that he understand that for the boys to develop appropriately they must have a close and solid bond with their mother. Thus the best thing that Mr. Baker could do for his sons is to help establish a healthy relationship between the boys and their mother.

While both parents suffer from substance abuse problems Mr. Baker is in better control of this than is Ms. John. Ms. John continues to be at risk in many areas. She desperately needs to resolve her alcohol problem and needs to address other social and emotional issues. Ms. John is still young and can overcome these problems. She must however take the initiative to do so.

With regard to the general bearing of the parties, Mr. John appears to be more aloof and stern. Ms. John appears to have a more affectionate nature which the boys will need.

The boys need stability and consistency in their lives. They also need the love and affection of both parents.

After considering all of the statutory factors the Court concludes that, at least as long as Mr. Baker resides in Northway and Ms. Johns [sic] resides in Mentasta, and presuming that both parties are sober while with the children, it is in the best interest of the Children that Mr. Baker receive school year custody of the children with Ms. Johns [sic] to have them every other weekend, beginning after school Friday and lasting until 5:00 Sunday afternoon. During the summer months Ms. John shall have custody of the children for at least eight weeks with Mr. Baker to have visitation every other weekend. It shall be the responsibility of the custodial parent to provide transportation of the children to the non-custodial parent. For instance, during the school year Mr. Baker must deliver the children to Ms. John after school Friday and Ms. John must see that the children are back with Mr. Baker Sunday afternoon.

The parties shall evenly split school holidays and shall give the other party the option of caring for the children when extended babysitting is required.

Neither party shall consume alcohol or illegal substances while having custody of the children.

Mr. Baker shall continue his alcohol counseling in Northway. Ms. John shall take parenting classes as available and shall purse substance abuse and emotional counseling available to her in Mentasta.

If either parent has reason to believe that the other is under the influence of alcohol or that the safety of the children is at risk, they need not deliver the children to the other parent.

Disagreements with regard to the implementation of this order shall be resolved by the Northway Tribal council.

13. The issue of past child support is confusing in this matter. The children have been with both parents and have also spent time with each parent separately. There have been numerous exchanges and the record of who had them for what precise periods of time is unclear. It is clear however that the children have been adequately provided for and are not currently at risk. Therefore the Court will not require either party to be responsible for past child support. Beginning April 1, 1997 Ms. Baker [sic] shall pay child support to Mr. Johns [sic] in the minimum amount of $50.00 per month per child. If she is unable to make this payment her permanent fund dividend shall be set aside to meet her obligation.

14. Each party shall bear their own costs and fees.

JUDGMENT

Judgment shall enter as set forth above. Defendant's counsel shall submit a Child Custody and Support Order consistent herewith.

/s/ Ralph R. Beistline
RALPH R. BEISTLINE
SUPERIOR COURT JUDGE

NATIVE VILLAGE OF NORTHWAY
NORTHWAY NATIVE VILLAGE COUNCIL

ORDINANCE NO. 83-5

WHEREAS: the traditional law of Northway Village vested the judicial authority in the Village; and

WHEREAS: the Native Village of Northway desires to develop a modern judicial system to enforce village law,

NOW IT IS THEREFORE ORDAINED AS FOLLOWS:

Section 1. Judicial Authority

The judicial authority of the Native Village of Northway shall be vested in the Northway Village Council (hereinafter called the Council). In exercising such judicial authority, the Council shall hear all civil and criminal matters arising within its jurisdiction.

Section 2. Applicable Law

(a) In all cases before the Council in its judicial capacity, the Council shall apply the following law in the following order:

(i) the ordinances of the Native Village of Northway;

(ii) the traditional and customary law of the Native Village of Northway;

(iii) such Federal and State laws which may apply.

(b) Where any doubt arises as to the traditional and customary law of the Native

Village of Northway, the Council may request the advice of elders familiar with such customs and traditions.

(c) Where any question arises as to the application of any State or Federal law, the Council may certify such question to the appropriate Federal or State Court.

(d) In all cases before the Council in its judicial capacity, the Council shall give full faith and credit to the laws and judicial Acts of the United States of America and such States which equally extend full faith and credit to similar laws and acts of the Native Village of Northway.

Section 3. Procedures

(a) The Council shall keep a record of all judicial proceedings consisting of:

(i) a certified tape recording of each proceeding;

(ii) a certified copy of all orders and written documents entered in connection with such case.

(b) The Council shall adopt regulations governing the judicial proceedings of the Council, PROVIDED that all acts of the Council shall comply with the Indian Civil Rights Act (25 USC 1301-1303).

Section 4. Indian Country

The territorial jurisdiction of the Northway Village Council, in exercising its judicial

function, shall extend to and include the Indian Country of the Native Village of Northway.

Section 5. Civil Matters

In enforcing any civil ordinances and decisions and other disputes between persons, the Council, in its judicial capacity, may enter an order upon proper findings, which:

(i) requires restitution to a party,

(ii) requires community work,

(iii) levies a fine not to exceed $500, and/or

(iv) decides custody, divorce, adoption, support, other domestic relation matters, or

(v) awards unrestricted property.

In hearing any civil matter, the Council shall not enter any order requiring incarceration, or revoking any license.

Section 6. Criminal Matters

In enforcing any criminal ordinance or traditional criminal prohibition, the Council, in its judicial capacity, may enter an order, upon proper findings, which:

(i) requires incarceration, not to exceed six (6) months,

(ii) revokes a tribal license, or

(iii) prohibits entry by the convicted person into the Indian country of Northway.

Section 7. Evidence

In all cases before the Council in its judicial capacity, the Council shall hear all evidence it finds proper. In all cases, hearsay evidence given under oath shall be proper evidence.

Section 8. Tribal-State Agreements

The Council shall have the power to enter into any agreement with the State providing for the cooperative exercise of its judicial functions.

Section 9. Code

This ordinance shall be known as the Tribal Judicial Code.

ORDAINED AND ENACTED BY THE NORTHWAY NATIVE VILLAGE COUNCIL THIS 20th DAY OF January, 1983.

ATTEST:

/s/ Gary Thomas
President

/s/ Marion Sam
Secretary

NATIVE VILLAGE OF NORTHWAY
TRIBAL COURT

JOHN BAKER,	)	
Petitioner	)	
v.	)	Case No. 95-CC004
ANITA JOHN, MENIASIA,	)	
Respondent	)	

JUDGMENT

A hearing was held in this matter on the 29 day of August ___, 1995. The Petitioner, JOHN BAKER OF NORTHWAY (name) received notice of the hearing and [X] participated [ ] /did not participate. (circle one) The Respondent, ANITA JOHN OF MENTASTA (name) received notice of the hearing and [X] participated [ ] /did not participate. (circle one)

THE TRIBAL COURT BEING FULLY INFORMED IN THE MATTER, IT IS THE JUDGMENT OF THE TRIBAL COURT THAT:

Split custody of Emmanual Baker and John Baker II. Parents will keep children on 1 month intervals, help each other financially, with liberal visitation. Both parties will abide by this judgment until the start of school (kindergarten) for John Baker II. At the start of school for John II, the tribal court will meet with all parties involved to decide permanent placement of the children for school months and summer vacation months.

DONE BY TRIBAL COURT ACTION THIS 29 day of AUGUST 1995.

/s/ Lorraine Titus by Belinda Thomas
Tribal Court Judge

STATUTES INVOLVED

Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* (1978)

25 U.S.C. § 1903 (Definitions)

For the purposes of this chapter, except as may be specifically provided otherwise, the term –

(1) "child custody proceeding" shall means and include –

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult,

would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indian by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "trible court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any

other administrative body of a tribe which is vested with authority over child custody proceedings.

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25 U.S.C. § 1911 (Indian Tribe Jurisdiction Over Indian Child Custody Proceedings)

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings, declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*. That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

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25 U.S.C. § 1918 (Reassumption of Jurisdiction Over Child Custody Proceedings).

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such

tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provision of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title

over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection(a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, Title I, 108 Stat. 4791 (1994) (codified in part at 25 U.S.C. §§ 479a – a-1)

SEC. 101. SHORT TITLE.

This title may be cited as the "Federally Recognized Indian Tribe List Act of 1994".

SEC. 102. DEFINITIONS.

For the purposes of this title:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 104 of this title.

SEC. 103. FINDINGS.

The Congress finds that –

(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;

(2) ancillary to that authority, the United States has a trust responsibility to recognized

Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;

(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;

(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;

(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;

(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;

(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and

(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

SEC. 104. PUBLICATION OF LIST OF RECOGNIZED TRIBES.

(a) PUBLICATION OF THE LIST. – The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) FREQUENCY OF PUBLICATION. – The list shall be published within 60 days of enactment of this Act, and annually on or before every January 30 thereafter.

(2)

No. 99-973

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN BAKER,

Petitioner,

v.

ANITA JOHN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

This case involves the custody of two minor Indian children, and the essentially state law question of whether state courts can extend comity to tribal court proceedings.

Petitioner John Baker is an Athabascan Indian and a member of the Native Village of Northway. Respondent Anita John is an Athabascan Indian and a member of the Native Village of Mentasta.

1. Mr. Baker was 25 when he started his relationship with the 14-year-old Ms. John in early 1990. Two children resulted from this relationship, John Baker Jr., born July 31, 1991, and Emmanuel Baker, born June 30, 1992. Following a series of alcohol-related domestic assaults perpetrated by Mr. Baker, for one of which he was convicted, the couple separated shortly after Ms. John turned 18, in 1993.

Initially, the parents were able to acquiesce in a mutually acceptable custody arrangement on their own. In the spring of 1995, Ms. John approached Alaska's Child Support Enforcement Division about obtaining financial support for the children from Mr. Baker. However, that agency, notoriously slow, did not serve Mr. Baker with its support papers until several months later.

Meanwhile, on July 31, 1995, Mr. Baker filed a petition with the Northway Tribal Court to enter a custody decree in his favor – the same court whose jurisdiction, and even existence, Mr. Baker now contests. The Northway Tribal Court initially conferred with representatives of Mentasta, to avoid any jurisdictional competition between the two, and obtained the approval of Mentasta's representatives to have the case go forward in the Northway Tribal Court. This was with the approval of Ms. John, who felt that a court order would reduce conflicts and confrontations, and felt that Mr. Baker would be more accepting of a court order issued by the Tribal Court of his own Village, Northway. Therefore she filed her own petition with the Northway Tribal Court, in August 1995.

The Northway Tribal Court held a hearing on August 29, 1995, with both parents attending. At the conclusion of the hearing, the Northway Tribal Court issued a temporary order, calling for the children to spend alternating months with their father in Northway and their mother in Mentasta, and indicating that a follow-up hearing to resolve custody on a permanent basis would be held prior to the older child's entry into kindergarten (September 1996). The Northway Court also specified that no child support was to be ordered.

Shortly after the hearing, Mr. Baker was served with the administrative support papers from the Alaska Child Support Enforcement Division, in the case initiated by Ms. John several months previously. As the Northway Tribal Court had ordered that neither party should pay support, getting the CSED papers was particularly galling to Mr. Baker, since he did not understand at that point that Ms. John was not attempting to circumvent the Northway order.

Adding to his frustration, Mr. Baker was arrested for Driving While Intoxicated three days after the Tribal Court hearing. This arrest led to a conviction and sentence which temporarily prevented him from exercising his time under the month-on-month-off schedule.

2. In December 1995, Mr. Baker hired a Fairbanks attorney to file the identical custody suit against Ms. John in Alaska's state superior court that he had earlier filed in the Northway Tribal Court. Mr. Baker's "Child Custody Jurisdiction Affidavit" (required under state law to be filed along with the custody complaint in order to establish the basis for the state court's jurisdiction) falsely swore: "The plaintiff is unaware of any custody proceeding regarding the children, except as provided herein, in Alaska, or any other jurisdiction," and "Father has not participated as a witness, party, or in any other fashion in any custody proceeding in Alaska or in any other jurisdiction."

Ms. John filed a motion to dismiss the complaint on the basis of the pending Northway Tribal Court proceedings initiated by Mr. Baker. While the motion was pending, the superior court entered a temporary custody order which paralleled the Northway order, alternating months with each parent. However, in April 1996, the superior court, without holding a hearing, changed that order to specify that primary custody would be awarded to Mr. Baker *pendente lite*.[1]

The superior court in July 1996 issued a decision denying Ms. John's motion to dismiss. A half-day court trial was held in March 1997, following which the superior court awarded custody to Mr. Baker.

3. Ms. John appealed the superior court's decision to the Alaska Supreme Court. In March 1998, the Alaska Supreme Court *sua sponte* ordered supplemental briefing on several issues related to the February 1998 "Indian country" decision of this Court in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), and requesting the State of Alaska to file an *amicus* brief.

The United States thereupon sought and was granted leave to file its own *amicus* brief, and *amici* briefs were

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[1] This followed an incident in which respondent, realizing that she was relapsing into her own drinking problem, called petitioner to come and pick up the children. This was characteristic of the working relationship the two parents had had until that point. As the state trial court explicitly found, both parents have a severe alcohol problem. Each tended to call on each other in times of need, to care for the children when his/her own alcohol abuse exceeded his/her ability to control it. Respondent did so in March 1996, but following that, petitioner filed a motion to modify the temporary custody order and the state superior court, without holding a hearing, did as he requested.

also filed on behalf of several Alaska Native organizations.

The United States started with the premise that Northway was a federally recognized Indian tribe, and urged the Alaska Supreme Court to recognize that a tribe could possess sovereignty over its tribal members regardless of whether the tribe occupied "Indian country"; and to rule that Congress had not intended to eliminate tribal jurisdiction over tribal members in enacting the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (1971), codified as amended at 43 U.S.C. §§ 1601 *et seq.*

The State of Alaska agreed that Northway was a federally recognized Indian tribe. It also agreed that tribes could possess sovereignty over tribal members outside "Indian country"; that tribal law would govern tribal child custody disputes resolved in tribal tribunals; and that ANCSA did not eliminate tribal jurisdiction over tribal members. The State urged the court, however, to reject respondent's argument that Northway's proceedings were entitled to full faith and credit, and instead to rule that comity was the appropriate vehicle through which to recognize the tribal proceedings in this case.

In its opinion, the Alaska Supreme Court by and large followed the urging of the United States and the State of Alaska. It held that federally-recognized tribes such as Northway could resolve custody disputes between tribal members without regard to whether the tribe occupied Indian country. Most significantly for purposes of this petition, the Alaska Supreme Court agreed with the State of Alaska that comity was the appropriate vehicle through which to determine what deference to give to the pending tribal court proceedings. (The only major departure from the positions advanced by the United States and the State of Alaska was the court's

decision not to overrule its *Nenana* line of cases,[2] instead distinguishing them on the basis that those cases involved "child custody proceedings" within the meaning of the Indian Child Welfare Act, 25 U.S.C. §§ 1901, 1903(1) (hereafter "ICWA"), whereas the dispute between Mr. Baker and Ms. John did not.) The case was remanded to the superior court for application of the comity framework to the facts, with particular inquiry into whether the children would be eligible for membership in the Native Village of Northway, and whether one could appeal from decisions of the Northway Tribal Court. Pet. App. 57-58.

Petitioner now seeks to have this Court accept this case to rule that the lower court erred in deferring to the federal government's recognition of Northway as an Indian tribe, and in ruling that this case is not governed by the Indian Child Welfare Act.[3]

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[2] From *Native Village of Nenana v. State Dept. of Health & Social Services*, 722 P.2d 219 (Alaska 1986), *cert. denied*, 479 U.S. 1008 (1986), the first of several pre-1993 cases holding that if a child protective case was filed initially in state court, a tribe could not force the state court to transfer that case to its tribal court under 25 U.S.C. § 1911(b) until the Secretary had approved a re-assumption petition under 25 U.S.C. § 1918, and suggesting in *dicta* that tribes might lack authority to deal with child custody proceedings at all under Pub. L. No. 83-280, 67 Stat. 588 (1953) (hereafter "P.L. 280"), extended to Alaska by Pub. L. No. 85-615, 72 Stat. 545 (1958). The Ninth Circuit took issue with the latter proposition, although agreeing with the former, in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991); and indeed the broader reading of *Nenana*, if intended, would put Alaska law at odds with case law from federal and other state courts, *see Venetie*, 944 F.2d at 559-561. The Alaska Supreme Court's opinion in this case signals a rapprochement between the state and federal lines of authority, even though it refrains from explicitly overruling *Nenana*.

[3] Petitioner has not sought *certiorari* on the issue to which the lower court devoted most of its analysis, and with which the

ARGUMENT

There are both procedural and substantive reasons why the petition should be denied. The lower court ruling lacks finality; the first and second questions presented were not raised below; the third question presented is too procedurally convoluted and inconsequential, even to these parties, and the state court decision rests on an independent and adequate state ground in any event; none of the issues posed have led to any conflicts among the lower courts; and petitioner's historical analysis is flawed and provides no reason for plenary review by this Court.

I. This case does not present a "final decision."

To be reviewable, the state court judgment "must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945). "[T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up – for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948). If the remand leaves open some matter that is not merely ministerial and that might itself create a federal question, such as a remand for a new trial, the judgment is normally deemed nonfinal and nonreviewable. *Houston v. Moore*, 3 Wheat. 433, 434 (1818); *San Diego Gas & Elec. Co. v. San Diego*, 450

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dissent took issue, *i.e.*, whether tribes retain non-territorial membership-based jurisdiction that includes the authority to decide child custody disputes, Pet. App. 32-44, 81-139; nor is this issue even arguably subsumed in the questions he does present. *See* Rule 14.1(a).

U.S. 621, 632-33 (1981); *O'Dell v. Espinoza*, 456 U.S. 430 (1982). Although the Court has adopted a pragmatic and flexible approach in interpreting this requirement, it has also warned that this pragmatism cannot "swallow the rule" of finality embodied in 28 U.S.C. § 1257. *Flynt v. Ohio*, 451 U.S. 619, 622 (1981).

In this instance, by the very terms of the Alaska Supreme Court's order, the case has been remanded to the superior court to determine whether or not comity should be extended to the tribal court proceedings as a matter of state law. Thus, the judgment below is clearly non-final. The petitioner may well prevail on remand and never go back to tribal court at all, since he will no doubt urge upon the superior court every possible reason for not extending comity. Further, even if the case is returned to the Northway Tribal Court, there is no predicting whether that court's final order will award custody to the petitioner or the respondent.

The decision below does not qualify under any of the limited exceptions to the finality requirement enumerated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975) and restated in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997) (declining to expand *Cox Broadcasting* list of exceptions). The outcome of the state court proceedings is not "preordained"; the federal issue will not "require decision regardless of the outcome of future state court proceedings" (as petitioner may still prevail on the comity determination, mooting further dispute over the federal issues); there is no governing state law which bars him from preserving his federal claims for later review by this Court if he so chooses; and there is no serious erosion of federal policy which would flow from a refusal to

review the state court proceedings at this interlocutory juncture.[4]

Probably the closest finality analogue is to the pre-1948 case law when state courts had a decision-making role on petitions for removal from state to federal court. Finality was lacking in a judgment of the highest state court rejecting a petition for removal of a case to federal court and remanding for further trial proceedings. R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 3.7 at 106-07 (7th ed. 1993). *Ipso facto*, a judgment of the highest state court reversing a trial court's denial of a petition for removal, and remanding for further proceedings to make a new removal determination, would fall even further short of the prerequisite finality requirement. There is no reason to apply a different rule of finality here where the issue involves a state court deciding whether or not to defer to a tribal court.

II. Petitioner's first and second "questions presented" were not raised before the court below, and regardless do not present issues meriting a grant of *certiorari*

Rule 14.1(g)(i) requires that the petition specify the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal

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[4] Additionally, petitioner has suggested in the superior court that both he and respondent were living within "Indian country" at the time the Northway proceedings were filed; he claims that he was living on an Alaska Native allotment in Northway, and that she was living on an Alaska Native allotment in Mentasta. *Cf. Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, ___ n. 2. Further development of these questions is currently being explored at the trial court level, additionally underscoring the lack of finality in the decision below.

questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to places in the record where the matter appears, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. Compliance with these requirements is notably absent from the petition in this case.

It is essential to the jurisdiction of this Court under § 1257 that a substantial federal question have been properly raised in the state court proceedings. The validity of a statute or regulation is "drawn in question" only if "the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied." *Miller v. Cornwall R. Co.*, 168 U.S. 131, 133 (1897); *see also United States ex rel. Champion Lumber Co. v. Fisher*, 227 U.S. 445, 449-51 (1913). It is not enough to draw a provision into question by controverting rights claimed thereunder, or by disputing an act done by virtue of such statute or treaty. *Baltimore & Potomac R. Co. v. Hopkins*, 130 U.S. 210 (1889); and *see Phillips v. United States*, 312 U.S. 246, 252 (1941).

Petitioner contends here that the Interior Secretary's recognition of Northway's tribal status is an *ultra vires* act violating the Constitutional separation of powers provision. The constitutional argument is not mentioned in the lower court opinion, and the issue of Secretarial authority receives only a passing reference, Pet. App. 21, *because these arguments were not made before the court below.*

In fact, petitioner's position below was quite the opposite. Before the Alaska Supreme Court petitioner's counsel stated, "Mr. Baker has also asked me to tell this court he is a strong supporter of tribal courts. He would

like to see tribal courts recognized, tribal court jurisdiction recognized, as long as they are fair. He feels very strongly and has asked me to tell you this."

Even the dissenting opinion below (which subordinated succinctness to comprehensiveness and omitted no line of attack suggested by the parties or otherwise) did not note any separation of powers or *ultra vires* issue, and in fact acknowledged that federal recognition of the Native Village of Northway was a *fait accompli*. Pet. App. 73, 125 ("It is also true that tribal recognition by the Department of the Interior is given conclusive deference as a non-justiciable political question, presumably because the Department has been delegated authority by Congress to make such a determination").[5] Plainly, those issues were simply never presented to the court below.

Even if they had been, arguments about Northway's tribal status, as framed by petitioner, would not merit this Court's review. Petitioner's argument that in 1993 the Secretary of the Interior lacked power to confirm tribal status has not gained acceptance legislatively, administratively or judicially. The 1993 list was just one link in a chain of lists, which the Secretary had started publishing in 1979, to resolve confusion over which entities were and were not "tribes," *see* D. Getches, D. Rosenfelt, C. Wilkinson, Federal Indian Law at 238-39 (1979). These lists were promulgated pursuant to regulations on the "Federal Acknowledgement Process" (FAP), which provide for lists of recognized tribes and for administrative procedures for entities excluded from the lists but wishing to obtain federal recognition. The FAP regulations, 25 C.F.R. part 83 (1999), were initially proposed in June 1977, and

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[5] The *ultra vires* argument not raised before the lower court in this case is, however, before the Alaska Supreme Court in another case currently awaiting decision: *Native Village of Mekoryuk et al. v. Moses*, Alaska Supreme Court Case Nos. S-08908, S-08919.

after much discussion finalized in September 1978 (43 Fed. Reg. 39361, Sep. 5, 1978), with the first list published a few months later. 44 Fed. Reg. 7235 (Feb. 6, 1979).

During this period, Congress considered special authorizing legislation, but did not enact any, after being assured by the Secretary that existing statutory authority, although general rather than specific, was adequate. *See* "Recognition of Certain Indian Tribes: Hearing on S. 2375 before the Senate Select Comm. on Indian Affairs," 95th Cong., 2d Sess. 15 (1978); "Federal Recognition of Indian Tribes: Hearing on HR. 13773 and Similar Bills (Including H.R. 12996) before the Subcomm. On Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs," 95th Cong., 2d Sess. 14 (1979). Thus, the lack of specific authorizing legislation was not, as petitioner argues, indicative of Congressional intent that such lists should not be promulgated, but indicative of Congressional acquiescence that such legislation was unnecessary to authorize secretarial recognition.

The list and the FAP added much-needed structure to these questions in the lower 48, but initially only added to the confusion in Alaska. The 1979 list left Alaskan tribes off, promising to address them later. The 1982 list included Alaskan tribes, but with a cryptic preamble that left their status uncertain, *see* 47 Fed. Reg. 53130, 53133-34 (Nov. 24, 1982). The 1983 list excluded the Alaskan preamble, leaving advocates arguing about the significance of that omission; *see* 48 Fed. Reg. 56862 (Dec. 23, 1983). The 1988 list greatly expanded the scope of Alaskan entities to include ANCSA corporations, with a longer and more confusing preamble. *See* 53 Fed. Reg. 52832 (Dec. 29, 1988). In sum, the Alaska lists up through 1988 managed to generate controversy without achieving clarity; but at no point did the Interior Department express any hesitation about its authority.

The Interior Department under the Bush Administration decided to put an end to this administrative ambiguity, recognizing that the confusion it had generated was largely responsible for the judicial confusion in such cases as *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 34, 43 (Alaska 1988), in which a sharply divided Alaska Supreme Court ruled as a matter of law that, as of 1988, the federal government did not intend Alaska Native villages to be treated as sovereigns; and in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 561 (9th Cir. 1991) (the "Venetie adoption" case), which similarly found the historical record as to explicit federal recognition non-dispositive, but remanded the case to the federal district court for a fact-specific determination as to whether Venetie and Fort Yukon were tribes.[6]

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[6] On remand, the district court bifurcated the issues as to the two villages, stayed the action as to Fort Yukon, and consolidated Venetie's tribal adoption case with a separate case filed against Venetie to enjoin its imposition of a tribal business tax on its former reservation acquired under ANCSA. Following a week-long trial, the federal district court issued three separate decisions: first, that Venetie was a federally-recognized tribe and therefore could validly grant adoptions over tribal children, *Native Village of Venetie I.R.A. Council v. Alaska*, 1994 WL 730893 (D. Alaska, December 23, 1994) ("Decision – Tribal Status"); second, that Venetie's "Indian country" status did not bear on its ability to grant tribal adoptions and the two cases could therefore be re-bifurcated, *Native Village of Venetie I.R.A. Council v. Alaska*, 1994 WL 730887 (D. Alaska, December 23, 1994) ("Case Status – Adoption Case"); and third, Venetie did not occupy Indian country and therefore could not impose the tax, *Native Village of Venetie I.R.A. Council v. Alaska*, 1995 WL 462232 (D. Alaska, August 2, 1995) ("Decision – Indian country").

On the tribal adoption ruling, the State of Alaska initially moved for reconsideration, but subsequently withdrew its motion, chose not to appeal, and stipulated that Fort Yukon, too,

It was to bring much-needed clarity to this area that former Interior Solicitor Sansonetti undertook, starting in 1991, a comprehensive review of federal Indian law in Alaska. After over a year of effort, Solicitor Sansonetti's opinion found, *inter alia*, that there were indeed federally recognized tribes in Alaska, but that the ANCSA lands occupied by those tribes were not "Indian country." The task of delineating which tribes merited federal recognition, the opinion put off for another day, although it suggested that the modified ANCSA list (containing over 200 Alaska Native villages) was the appropriate starting point.[7] Since the opinion was issued shortly before Solicitor Sansonetti left office, the task of finalizing the list fell to his successors. Following solicitation of comments from the State, the affected tribes, and other interested entities, the Interior Department in October 1993 published its list of federally recognized tribes in Alaska. The language of the preamble made it crystal clear that the Secretary intended to eliminate any ambiguity and

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would, if a trial were held, qualify as a federally recognized tribe. *Native Village of Venetie I.R.A. Council v. Alaska*, No. F86-0075 CV (D. Alaska, Sep. 20, 1995) ("Partial Motion for Summary Judgment – Tribal Status") and December 12, 1995 ("Order – Motions for Reconsideration").

The district court's opinion in Venetie's "Indian country" tax case, though reversed by the Ninth Circuit in *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government*, 101 F.3d 1286 (9th Cir. 1996), was subsequently essentially affirmed by this Court in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).

[7] "We have rejected the notion that there are no tribes in Alaska. Which Native villages are tribes is a fact-specific determination beyond the scope of this opinion." Solicitor's Opinion No. M-36975, "Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers," Jan. 11, 1993, at 132. The "modified ANCSA list," *id.* at 59, refers to 25 U.S.C. §§ 1610, 1615, as supplemented by the Secretary.

declare "expressly and unequivocally" that the Alaskan tribes on the list had the same "government-to-government relationship with the United States" and the "right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes," 58 Fed. Reg. 54364, 54365-66 (Oct. 21, 1993). Thus, not until Solicitor Sansonetti undertook his comprehensive review, paving the way for the 1993 list, did Alaska get the benefit of the lucidity that the lists had earlier brought to tribal recognition questions in the lower 48.

Petitioner's argument that the 1993 list was *ultra vires*, although not raised below, has been raised and rejected previously, in a different case before a federal court, in *Native Village of Venetie I.R.A. Council v. Alaska*, 1994 WL 730893 (D. Alaska, December 23, 1994) ("Decision – Tribal Status"), slip op. at 8-11. The court reasoned that the Interior Department had been deciding federal recognition issues for more than 90 years with Congress's knowledge and acquiescence, citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915) (Congressional acquiescence for over 80 years in Interior Department's exercise of public lands authority).[8] Thus, the Alaska

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[8] Because the tribal adoption in that case had occurred prior to the 1993 list, and because the parties disagreed as to the effect of the list on pre-1993 actions, the opinion went on to analyze the tribal status of Venetie without regard to the list, concluding that Venetie was a tribe regardless of the list. The same court later re-affirmed its holding on the validity of the list as to the Native Village of Fort Yukon in *Native Village of Venetie I.R.A. Council v. Alaska*, No. F86-0075 CV (HRH) (D. Alaska, September 20, 1995) ("Partial Motion for Summary Judgment – Tribal Status"), slip op. at 6-11; and as to the Native Village of Tyonek in *Native Village of Tyonek v. Puckett*, No. A82-0369 CV (HRH) (D. Alaska, October 29, 1996) ("Order: Tribal Status/ Sovereign Immunity"), slip op. at 11-18.

Supreme Court here, though not discussing the *ultra vires* or separation of powers arguments, reached a result consistent with the decisions of the relevant federal district court.

Following issuance of the 1993 list, Congress in 1994 reviewed and effectively endorsed the list, enacting the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (hereafter Tribe List Act). Title I (codified at 25 U.S.C. §§ 479a *et seq.*) explicitly required the Secretary to publish a list of tribes annually. Title II of the same enactment (the Tlingit-Haida Status Clarification Act, codified at 25 U.S.C. § 1212 *et seq.*), added to the list one Alaskan tribe the Secretary had excluded. Petitioner argues, thrice, that the "texts of §§ 102 and 104" of the Tribe List Act do not dictate that the "tribal recognition" contemplated by the legislation goes beyond eligibility for programs and services. Pet. 29. This fairly clumsy elision of § 103 is presumably to gloss over the fact that the text of § 103, the congressional findings, includes the finding that "the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes," § 103(2). Further confirmation of Congress' intentions appears in the text of Title II of that same Pub. L. No. 103-154, the Tlingit-Haida Status Clarification Act, which refers to "the government-to-government relationship between the United States and other federally recognized Alaska Native tribes," 25 U.S.C. § 1214(a). Further, by arguing that the Secretary was authorized to recognize Alaska tribes as "eligible for programs," but not sovereign, the petition also ignores the fact that Congress, in an almost contemporaneous legislative enactment, specifically prohibited the Secretary from drawing such

distinctions as to the privileges and immunities of different categories of federally recognized tribes.[9]

The clear and unambiguous text of these statutes removes any need to consult their legislative history; but if the legislative history is to be considered nonetheless, it ought to be read without selective and misleading omissions. Congress in 1994 was well aware, not only of the consequences of federal tribal recognition, but also of the Interior Department's specific statements about Alaska tribes,[10] and if it wanted to overrule those clear declarations, it would have done so in terms equal in clarity to those it used to add the Tlingit-Haida Central Council to the list.

Petitioner faults the court below for not giving controlling weight to the material selectively excerpted in the petition's last footnote, Pet. 29-30 fn. 11 (thereby underscoring his own failure to bring this, or any of the rest of his argument on this point, to that court's attention). But the paragraph in the report immediately preceding the

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[9] Pub. L. No. 103-263, § 5(b), 108 Stat. 709 (1994), adding subsecs. (f) and (g) to 25 U.S.C. § 476 of Indian Reorganization Act.

[10] *See Native Village of Venetie I.R.A. Council v. Alaska*, 1994 WL 730893 (D. Alaska, Dec. 23, 1994) ("Decision – Tribal Status"), slip op. at 10; *see also* H.R. Rep. No. 103-781 (1994) at 4, reprinted in 1994 U.S.C.C.A.N. 3768, 3771; H.R. Rep. No. 103-800 (1994) at 4-5; and "Central Council Tlingit and Haida Status Clarification: Hearing on S. 1784 before the Subcommittee on Native American Affairs of the Committee on Natural Resources, House of Representatives," 103rd Cong., 2nd Sess. (1995) at 5 (Interior Department official explains to House Natural Resources Committee that Alaskan villages on the 1993 List "are not simply eligible to receive services, or are recognized as tribes for certain narrow purposes, but are recognized as political governmental entities who have maintained a government-to-government relationship with the United States by virtue of their special status as Indian tribes").

paragraph quoted by petitioner makes it clear that the Committee's concern was over Solicitor Sansonetti's conclusion that Congress "has left little or no room for tribes in Alaska *to exercise governmental authority over land or nonmembers*" (emphasis added).[11] Noting that the Solicitor's conclusion on that point was controversial, was subject to review at the administrative level, and was being litigated as well, the Committee report was drafted to avoid taking a stand on that question.[12] It was thus Solicitor Sansonetti's conclusion that Alaska tribes had no jurisdiction *over lands and non-members*, not his endorsement of Alaska tribal jurisdiction *over tribal members*, that concerned the Committee. By encouraging the Secretary to "continue the current policy" as of 1994, the Committee Report endorsed the 1993 preamble's stance, *i.e.*, that Alaska Native Villages had sovereign authority over their members, but that their authority over lands and non-members was an unresolved question. The Act was neither to expand authority beyond, nor diminish it below, that level.[13]

The petition's argument on this point suffers a final defect, in that petitioner focuses his attack on the wrong list. The petition criticizes the court below for "ignoring" the fact that the Tribe List Act authorized the Secretary to publish "a" list of recognized tribes, as distinguished

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[11] H. Rep. No. 103-781, 4-5, reprinted in 1994 U.S.C.C.A.N. 3768, 3771.

[12] Chronologically, this report was written before the Alaska Federal District Court issued either its 1994 "tribal status" decision in the Venetie adoption case or its 1995 "Indian country" decision in the Venetie tax case. See fn. 6 *supra*.

[13] In fact, by arguing the Report should be read to "deny to . . . any Native organization any degree of sovereign governmental authority over . . . persons in Alaska," Pet. 30 fn. 11, petitioner tries to mis-use the Report to advance a diminution in tribal authority, something the Committee itself clearly wanted to avoid.

from "the" list published in 1993. Pet. 29. However, the Secretary has published several lists subsequent to enactment of the Tribe List Act, which have similarly included the Native Village of Northway; and, since the first post-enactment list, *see* 60 Fed. Reg. 9250, 9255 (Feb. 16, 1995),[14] predated by several months petitioner's filing of his custody case before the Northway Tribal Court in July 1995, the pertinent inquiry (were any such issue properly preserved in the first place) would be whether the Tribe List Act authorized, under appropriate *Chevron* deference analysis,[15] the lists published subsequent to its enactment. Thus, even assuming the petition were correct in asserting that the 1994 Tribe List Act did not ratify "the" 1993 list, that is not the relevant issue. Tellingly, the petition does *not* contend that there was anything unauthorized or *ultra vires* about the 1995 and succeeding lists; it does not mention those lists at all.

III. Petitioner's third "question presented" is too convoluted and inconsequential to merit *certiorari*, and in any event there is an independent and adequate state-law ground for the decision below.

The remaining point for which *certiorari* is sought is whether an inter-parental custody dispute between two

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[14] *See also* 61 Fed. Reg. 58,211, 58,215 (Nov. 13, 1996); 62 Fed. Reg. 55,270, 55,275 (Oct. 23, 1997); 63 Fed. Reg. 71,941, 71,946 (Dec. 30, 1998).

[15] *Chevron v. National Resources Defense Council*, 467 U.S. 837 (1984). The petition cites a 1965 case, *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300 (1965), for the proposition that administrative agencies cannot make policy decisions for Congress, Pet. 26. This overlooks the impact of *Chevron*. Deference would apply, not only to the Secretary's interpretation of 25 U.S.C. §§ 2 and 9 in publishing the lists from 1978 to 1993, but also to the Secretary's interpretation of the Tribe List Act in publishing the 1995 and subsequent lists.

unmarried Indian parents is a "child custody proceeding" within the meaning of ICWA.

Petitioner is somewhat ill-positioned to raise this point as well. Before the state superior court, petitioner argued strenuously that his case against respondent was *not* an ICWA "child custody proceeding." Before the Alaska Supreme Court, he argued the contrary. That court, though finding he had arguably not preserved the point, chose to address it, Pet. App. 12 n. 28.

If this Court chooses to grant *certiorari* and reverse on this point, that would have two implications for the Alaska Supreme Court opinion, neither of which likely would benefit petitioner: (1) the court's rationale below for distinguishing its *Nenana* line of cases,[16] Pet. App.

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[16] The "*Nenana* line of cases" includes *Nenana* itself, *supra*, *Matter of K.E.*, 744 P.2d 1173 (Alaska 1987), and *Matter of F.P.*, 843 P.2d 1214 (Alaska 1992), *cert. denied*, 508 U.S. 950 (1993). The *F.P.* opinion moved away from *Nenana*'s P.L. 280 rationale, *see* fn. 2 *supra*, instead re-affirming *Nenana* on the separate basis that *Native Village of Stevens v. Alaska Management and Planning*, 757 P.2d 32 (Alaska 1988), held as a matter of law that as of 1988 the federal government had not recognized the existence of tribes in Alaska.

Both the United States and the State of Alaska in their *amici* briefs before the Alaska Supreme Court urged that court to overrule *Nenana*. Respondent agreed that the *Nenana* line of cases should be overruled, but also argued that even if the court chose to let that line of authority stand, this case was distinguishable in that (1) it was not a "child custody proceeding" within the meaning of ICWA, (2) Northway's jurisdiction was not premised on "Indian country" and therefore P.L. 280 had no bearing, and (3) the issue did not involve a mandatory § 1911(b) transfer to tribal court of a case first filed in state court, but rather the recognition of a case first filed in tribal court.

The Alaska Supreme Court, ruling narrowly in the tradition of appellate courts, chose to distinguish rather than overrule

11-14, would disappear, a result that might require that court to directly decide whether the *Nenana* line of authority itself should be overruled;[17] (2) the rationale for refusing to extend full faith and credit under ICWA (25 U.S.C. § 1911(d)) to the Northway Tribal Court proceedings, Pet. App. 50-53, would also disappear, leaving respondent with a significantly *stronger* basis for recognition of the tribal court proceedings than the "comity" approach which the court below adopted.

For this reason, respondent has in fact not yet decided whether, should this Court choose to grant *certiorari*, she would argue against this case being found a "child custody proceeding." However, she does feel constrained to point out that the issue is not difficult, and there is absolutely no conflict of authority on whether the term includes custody disputes between unmarried parents. The statutory definition of "child custody proceeding" is given as a list, of four types of cases which are included in the definition (foster care placements, terminations of parental rights, preadoptive placements, and adoptive placements), and two types of cases that are excluded (juvenile delinquency cases "and an award, in a divorce proceeding, of custody to one of the parents"). 25 U.S.C. § 1903(1). Thus, the question is not so much whether a custody dispute between unmarried parents meets the requirements of the divorce exclusion; it is whether such a case meets the requirements of any of the

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Nenana, but acknowledged that its ruling might carry implications for a future case presenting the opportunity to interpret P.L. 280. Pet. App. 17 n. 46.

[17] It also might not. The court might still distinguish *Nenana* on the third ground mentioned in fn. 16 *supra*, *i.e.*, 25 U.S.C. § 1911(b) does not speak to the situation where the tribal court case precedes the state court case. That distinction is suggested by the pre-*Nenana* case of *Matter of J.M.*, 718 P.2d 150 (Alaska 1986).

inclusions, i.e., whether it is a foster care placement, termination of parental rights, preadoptive placement, or adoptive placement. If not, it is not a "child custody proceeding." Those courts that have addressed the issue have had no difficulty in concluding that the definition of 25 U.S.C. § 1903(1) does not encompass inter-parental custody disputes. *Confederated Tribes of Colville Reservation v. Superior Court of Okanogan County*, 945 F.2d 1138, 1140 n. 3 (9th Cir. 1991); *Walksalong v. Mackey*, 549 N.W.2d 384, 387 (Neb. 1996); *In re Defender*, 435 N.W.2d 717, 721-22 (S.D. 1989). *See also DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514 (8th Cir. 1989); *Custody of Sengstock*, 477 N.W.2d 310, 312-13 (Wis. App. 1991) (stating rule). It seems a poor use of this Court's docket to take up an issue that has created absolutely no controversy whatsoever.

This case also presents an inappropriate case for *certiorari* on this point because there is an independent and adequate state-law basis for the judgment below: comity.

This case was the first opportunity for the Alaska Supreme Court to consider recognition of tribal court proceedings, not solely as a matter of federal mandate, but also as a matter of state judicial discretion. In the *Nenana* line of cases (as well as in the *Venetie* adoption case),[18] the question was whether federal law *required* state court recognition of tribal court proceedings. The court in this case also considered that question, but rejected respondent's argument that federal law mandated recognition of tribal court proceedings,[19] and instead

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[18] See fns. 2 and 16 *supra*.

[19] Ironically, the Alaska Supreme Court did so on the ground which petitioner seeks to have reversed here, *i.e.*, the holding that an inter-parental custody dispute is not a "child custody proceeding" within the meaning of ICWA. Pet. App. 50-51.

directed that such matters be resolved under state-law principles of comity on a case-by-case basis.

Comity is thus distinguishable from "full faith and credit," which is a rule of obligation rather than discretion. Full faith and credit may be a mandate under federal law or under state law. *See Webb v. Webb*, 451 U.S. 493 (1981) (writ of certiorari dismissed for want of jurisdiction where decision of court below rested on Uniform Child Custody Jurisdiction Act rather than Federal Constitution's Full Faith and Credit Clause, because petitioner failed to present federal issue before court below). Comity, on the other hand, functions "not as a matter of obligation, but out of deference and mutual respect," Pet. App. 53, quoting *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 695 (Ariz. App. 1977).

The "comity" analysis chosen by the Alaska Supreme Court sets out a framework under which state courts are permitted to recognize tribal court proceedings independently of federal law. That is, even if state courts are not obligated to recognize tribal court proceedings under federal law, that certainly presents no bar to a state court choosing to recognize tribal court proceedings under a discretionary comity approach. State-law comity, as distinguished from federal "full faith and credit" requirements, is a matter peculiarly within the discretion of the state courts being asked to grant it.

There is no indication that Congress intended ICWA to pre-empt state-tribal cooperation, or to prevent states and tribes from using comity or similar tools to establish working relationships among their courts; indeed, ICWA itself explicitly authorizes "States and Indian tribes . . . to enter into agreements with each other respecting . . . jurisdiction over child custody proceedings," 25 U.S.C. § 1919(a).

So, even assuming petitioner prevailed on his statutory interpretation argument, the resolution of that federal question in his favor would certainly not preclude

the Alaska Supreme Court from doing exactly as it did, *i.e.*, extending recognition to the proceedings of another entity as a matter of comity under state law.

IV. Petitioner's flawed historical analysis provides no reason for plenary review by this Court.

Petitioner's historical arguments rely heavily on the proposition that an 1884 enactment represented a Congressional decision against recognition of the existence of tribes in Alaska. Pet. 4-5, 28-29. However, that enactment simply does not contain the pronouncement which petitioner suggests.

The genesis document, the 1867 Treaty of Cession, explicitly recognized that there were "tribes" in Alaska, to be "subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." Treaty of Cession, March 30, 1867, U.S.-Rus., 15 Stat. 539, Art. III.

The 1884 Act was also predated by Congress's 1873 enactment making Alaska "Indian country" for the particular purposes of the liquor law sections of the Intercourse Act of 1834. Act of March 3, 1873, 17 Stat. 530; *see In re Carr*, 1 Alaska Fed. 75 (D. Ore. 1875).

If Congress had intended in the 1884 Act to negate its prior pronouncements as to "Indian tribes," some indication of that would have to appear in the statutory language. Instead, one actually finds a renewed reference to Alaskan "tribes" in the explicit text of the 1884 statute.[20]

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[20] Act of May 17, 1884 (District Organic Act), 23 Stat. 24, c. 53, sec. 8: "the land not exceeding six hundred and forty acres at any station now occupied as missionary stations *among the Indian tribes* in said section . . . shall be continued in the occupancy of the several religious societies . . . " (emphasis added).

The Act signals no change in policy as to tribal recognition; instead, it defers questions of dealing with Native issues, appointing a commission for study. *Id.*, sec. 12. The 1884 Act also defers land claims issues, with the status quo to be maintained: "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."[21] Section 13 made an appropriation of $25,000 to the Interior Secretary for the education of Territorial children "without reference to race," but within two months, Congress had made another *Native-specific* appropriation for education,[22] so obviously no policy pronouncement of major import can be read into the appropriation. The plain truth is that the 1884 Act was essentially stop-gap legislation, and will not carry the import with which petitioner seeks to saddle it. In fact, when an Alaskan tribe claimed permanent occupancy rights under that same 1884 Act, this Court explicitly ruled that "what was intended was merely to retain the status quo until further congressional or judicial action was taken," *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278 (1955).

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[21] *Id.* sec. 8. Future Congresses set different routes for title acquisition: for Native Alaskans, the Alaska Native Allotment Act was enacted, Act of May 17, 1906, 34 Stat. 197, formerly codified at 43 U.S.C. § 270-1 (repealed 1971); for others, the general homestead laws were extended to Alaska, Act of May 14, 1898, 30 Stat. 409.

[22] In July of 1884, Congress appropriated $15,000 for the support and education of Indian children of both sexes at industrial schools in Alaska, and another $20,000 for the same purpose was appropriated the following year. See *In re Can-ah-Couqua*, 29 F. 687, 688 (D. Alaska 1887).

Petitioner's snippets of non-statutory "authority" include a colloquy between Sheldon Jackson and Senator Manning Butler, as if Rev. Jackson's "new departure" in Indian policy was in fact incorporated into the 1884 legislation, *i.e.*, to "treat them as American citizens," Pet. 8. In fact, the 1884 Act did not make Alaska Natives into American citizens, and citizenship for Alaska Natives was not forthcoming for well over half of Alaska's territorial history. It was granted in the Citizenship Act of 1924, which applied to Alaska Natives and lower 48 Natives alike, making American citizens of "all non-citizen Indians born within the territorial limits of the United States." Act of June 2, 1924, ch. 233, 43 Stat. 253. Before then, although an Alaska Native could, like his lower 48 counterpart, become a U.S. citizen under the Dawes Act, c. 119, § 6, 24 Stat. 388 (1887), this had to be based upon a showing that he had "voluntarily taken up . . . his residence separate and apart from any tribe of Indians therein, and ha[d] adopted the habits of civilized life." *In re Minook*, 2 Alaska 200, 222 (D. Alaska 1904).

Laws passed between the Citizenship Act in 1924 and enactment of ANCSA in 1971 show that Congress still took the view that it could utilize its authority to "regulate Commerce . . . with the Indian tribes," U.S. Constitution, Art. I, sec. 8, to enact legislation with particular applicability to Alaska Natives, including the Alaska Native Townsite Act in 1926 (c. 379, 44 Stat. 629, formerly codified at 43 U.S.C. § 733 et seq., repealed in 1976); the Tlingit and Haida Indians Land Claims Lawsuit Jurisdictional Act in 1935 (49 Stat. 388);[23] the Alaska Amendment

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[23] By directly authorizing suit for compensation for the taking of aboriginal title, Congress rejected the 1932 intimation in the letter from Secretary Wilbur, relied on by petitioner (Pet. 9), that Alaskan tribes might not be sufficiently self-governing

to the Indian Reorganization Act in 1936 (49 Stat. 1250, 25 U.S.C. § 473a, amending Indian Reorganization Act of 1934, 48 Stat. 984, codified at 25 U.S.C. §§ 461 et seq., especially §§ 473, 479); the Reindeer Industry Act of 1937 (c. 897, 50 Stat. 900, codified at 25 U.S.C. §§ 500-500n); portions of the Alaska Statehood Act in 1958 (Sec. 4 of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), as amended, Pub. L. No. 86-70, 73 Stat. 141 (1959), 48 U.S.C. prec. 21 note);[24] and the extension of P.L. 280 to Alaska's "Indian country" in 1958 (Pub. L. No. 85-615, 72 Stat. 545, amending Pub. L. No. 83-280, 67 Stat. 588 (1953)).

An understanding of this last enactment highlights one of the fundamental flaws in the petition, *i.e.*, its

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to bring suit. Ironically, Secretary Wilbur signed that letter on March 14, 1932, less than three weeks after approving the Solicitor's Opinion "Status of Alaskan Natives," 53 Int. Dec. 593 (Feb. 24, 1932), which concluded, "no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned . . . they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States. It follows that the natives of Alaska, as referred to in the treaty of March 30, 1867, between the United States and Russia, are entitled to the benefits of and are subject to the general laws and regulations governing the Indians of the United States," *id.* at 605. It is unclear whether Secretary Wilbur failed to read the letter, or the opinion, or both.

[24] This provision required the State to disclaim any right or title to Native occupied lands, leaving their disposition to the Federal Government, and exempting Native lands from state taxation. Contrary to petitioner's broad intimations, nothing in the Alaska Constitution makes or implies a claim to "exclusive jurisdiction . . . to adjudicate domestic relations matters," Pet. 10, and nothing in the Statehood Act recognizes or accepts such a claim.

inability to distinguish between the concurrent jurisdiction of states and tribes when tribal jurisdiction is premised on tribal membership, and the presumptively exclusive jurisdictional enclaves created when tribal jurisdiction is premised on "Indian country." The petition assumes that the susceptibility of Alaska Natives to state law is somehow inconsistent with tribal status. But a Native Alaskan's membership in a federally recognized tribe does not insulate that individual from the application of state law; outside Indian country, that individual is as subject to state law as any other citizen. Hence, the fact that Territorial authorities frequently opined that Alaska Natives were subject to Territorial laws would not be inconsistent with those Natives' membership in a federally recognized tribe. The barrier to state law is presented, not by tribal membership, but by Indian country.[25] Given that P.L. 280 grants the state authority within what little Indian country still exists in Alaska under *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), there is little room to argue that an Alaska Native is exempt from state law, and no such proposition was announced by the court below.

What tribal recognition does mean is that, in addition to being subject to state law, an Alaska Native may also be subject, as a member of a federally recognized tribe, to tribal law and authority.

Of particular relevance on this point is a 1932 Solicitor's Opinion, "Validity of Marriage By Custom Among the Natives or Indians of Alaska," which stressed that the absence of reservations in Alaska and the historical fact that Congress dealt with Alaska Natives through legislation rather than through treaty (the two facts noted in

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[25] Thus it was the Indian country ruling in *In re McCord*, 151 F.Supp. 132 (D. Alaska 1957), which necessitated the extension of P.L. 280 to Alaska in 1958 to ensure that state law could govern throughout the state.

Secretary Wilbur's 1932 letter, Pet. 9) did not change the conclusion that "marriage among those natives constituting the uncivilized tribes, if entered into in accordance with their long-established customs, should be recognized as valid until Congress directs otherwise, irrespective of the Territorial laws . . . ," 54 Int. Dec. 39, 46 (1932). The Natives were not exempt from Territorial law, but subject to Tribal customs which merited recognition.[26]

ANCSA itself included implicit recognition that Alaska's Natives were members of distinct tribal communities. The statute lists over 200 such communities, 43 U.S.C. §§ 1610, 1615, with additional communities able to qualify if they consisted of at least 25 residents of an "established village," with a majority Native population, "not of a modern or urban character," *id.* The statute explicitly acknowledges the importance of the recognition of membership in these pre-existing Native communities, defining the term "Native" to include any U.S. citizen "who is regarded as an Alaska Native by the Native village or Native group *of which he claims to be a member* and whose father or mother is (or, if deceased, was) regarded as Native by any village or group," 43 U.S.C. § 1602(b) (emphasis added). (The statute did not require that new corporations replace the Villages' governing

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[26] Petitioner's echo of the concern of the dissent below that "Alaska law no longer applies to every Alaskan," Pet. 6, is thus either incorrect or insignificant. Alaska law still applies to every Alaskan, Native or non-Native, in or out of Indian country, and in that sense the statement is incorrect. Some Alaskans may, in their child custody disputes, be subject to the laws and courts of another jurisdiction, but that is nothing new; under long-standing jurisdictional principles, it has always been the case that any Alaskan may find himself litigating his child custody disputes in the courts of, and under the laws of, Florida or Arizona or any other State. In that sense, the statement is insignificant, in that Alaska law has never applied to every Alaskan.

councils; and today in Alaska most villages have both a governmental council and a corporation board.)

Dozens of post-ANCSA enactments indicate Congressional intent to include Alaska Native Villages in most major Indian legislation, *e.g.*, the Indian Financing Act of 1974, Pub. L. No. 93-262, § 3(c), 88 Stat. 77, codified at 25 U.S.C. § 1452(c); the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, § 4, 88 Stat. 2204, codified at 25 U.S.C. § 450b(e); the Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, § 4, 90 Stat. 1401, codified as amended at 25 U.S.C. § 1603(d); the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 4, 92 Stat. 3069, codified at 25 U.S.C. § 1903(8); and the Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, § 203, 96 Stat. 2607, 2626, codified at 26 U.S.C. § 7701(a)(40); all of which expressly provide for inclusion of Alaska tribes. The petition characterizes such statutes as "for the narrow purpose of eligibility for programs and services," Pet. 29 fn. 11. However, even if that were true, eligibility for these programs and services cannot validly be premised on the fact that the peoples to whom the "narrow purpose" applies are of a particular racial extraction; it must be premised on these Natives' status as members of Native polities, *i.e.*, tribes. *See Morton v. Mancari*, 417 U.S. 535 (1974).

Eventually, the list of Congressional enactments recognizing Alaska Native Villages as tribes grew too lengthy to be accurately characterized as limited to "narrow purposes," and the Secretary acknowledged that in formally recognizing the existence of the listed tribes in Alaska.

Even if this Court were prepared to overrule its seasoned precedent – that "it is the rule of this court to follow the action of the Executive and other Political Departments of the Government, whose more special duty it is to determine such affairs. If by them those

Indians are recognized as a tribe, this court must do the same," *United States v. Holliday*, 70 U.S. 407, 419 (1866) – the historical arguments presented by petitioner here provide no reason to do so in this case.

CONCLUSION

This Court should deny the petition.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
JAN 13 2000
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(3)

No. 99-973

In The

Supreme Court of the United States

JOHN BAKER,

Petitioner,

v.

ANITA JOHN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

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INTRODUCTION

Respondent does not deny that after a hearing at which she and petitioner were represented by counsel and both testified the Alaska Superior Court determined that it was in the best interest of Emmanuel and John Baker Jr. that petitioner have custody of both children because respondent "drinks every couple weeks," "always drinks until she blacks out," and "drinks when the children are around." App. 189.

Respondent does not deny that in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 41 (Alaska 1988), the Alaska Supreme Court concluded that Congress to that date repeatedly had "demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status." Respondent does not deny that in this action the Alaska Supreme Court reaffirmed its decision in *Native Village of Stevens* and then held that "[p]rior to 1993, no . . . recognition of Alaska villages [as 'federally recognized tribes'] had occurred." App. 18. Nor does respondent contest the fact that neither Northway nor any other Native village on Assistant Secretary of the Interior for Indian Affairs Ada Deer's 1993 list petitioned Assistant Secretary Deer for recognition as a "tribe" as her regulations required.[1]

Those facts in and of themselves demonstrate that the Alaska Supreme Court wrongly decided the questions

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[1] Like every executive branch official, Assistant Secretary Deer was required to comply with her own regulations. *See e.g., Service v. Dulles*, 354 U.S. 363 (1957) (personnel action taken by Secretary of State in violation of Department of State regulations unlawful).

presented in the petition.[2] The Alaska Supreme Court's decision also conflicts with numerous relevant decisions of this Court, and implementation of the decision, first in Northway and then in more than 200 other Native villages, will have significant adverse consequences for Emmanuel and John Baker Jr. and thousands of other Native children, and, as Chief Justice Matthews has

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[2] Respondent asserts that the Tlingit and Haida Status Clarification Act (THSCA), which the 103d Congress enacted as Title II of the statute, Pub. L. No. 103-454, in which the Federally Recognized Indian Tribe List Act (FRITLA) was enacted as Title I is evidence that the 103d Congress intended FRITLA to ratify Assistant Secretary Deer's *ultra vires* action. *See* Brief in Opposition to Petition, at 15. However, the bill that became THSCA was introduced by Alaska Senator Frank Murkowski to allow the Tlingit-Haida Central Council to resume contracting with the Bureau of Indian Affairs (BIA) pursuant to the Indian Self-Determination Act. As Senator Murkowski explained when he introduced it: "The bill does not do anything new. The bill makes a technical correction to BIA's list and *should not be viewed as setting any precedent for Federal recognition of a tribe.* My bill simply restores the status quo of October 20, 1993. . . . " (emphasis added). 139 CONG. REC. 32428 (1993). That objective is consistent with the position Senator Murkowski and the other members of Alaska's congressional delegation have held since Native sovereignty became an issue in Alaska in the 1980s. *See e.g., Amendments to the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act and to Establish a Memorial in the District of Columbia: Hearing on S. 485, et al., before the Subcomm. on Public Lands, Reserved Water and Resource Conservation of the Senate Comm. on Energy and Natural Resources,* 99th Cong. 3 (1986) (statement of Senator Murkowski that "I will not support any legislation which leads to the creation of a series of independent sovereign entities in Alaska").

expressed the concern – *see* App. 63-64, for the future of Alaska as a cohesive civil society.[3]

As frequently occurs at the certiorari stage when no colorable objection to a petition can be made on the merits, respondent has concocted procedural objections that she hopes will persuade the Court to deny plenary review. And the governor of Alaska, appearing as amicus curiae on behalf of respondent, urges the Court to deny review because, as a policy matter, "the State . . . welcomes the resolution that [the Alaska Supreme Court's decision] brings to State-Tribal relations in Alaska." Brief for the State of Alaska, at 3.

However, respondent's procedural objections are devoid of merit. And the Court should evaluate the governor's recommendation by placing his opposition to plenary review in its proper context.

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[3] The intrusion into this action by the amici curiae that appeared before the Alaska Supreme Court on behalf of respondent validates Justice Matthews' concern that respondent's objective in this action is not protection of the best interests of Emmanuel and John Baker Jr. and other Native children, but rather the imposition of a new federal Native policy in Alaska by *ultra vires* agency action and judicial fiat. In addition to the "State of Alaska" (about whose appearance here more will be said), amici included the BIA (appearing through the Department of Justice), the Native Village of Venetie (the losing respondent in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998)), the Alaska Inter-Tribal Council (an umbrella organization that spearheads the Native sovereignty movement in Alaska), and the Paskenta Band of Nomlaki Indians, the Scotts Valley Band of Pomo Indians, and the Death Valley Timbisha Shoshone, who appeared because they aspire to exercise the same jurisdiction in California that, unless reversed by this Court, the Alaska Supreme Court's decision will allow 226 governing bodies of Native villages to exercise in Alaska.

The Decision of the Alaska Supreme Court is a Final Judgment for Purposes of 28 U.S.C. § 1257.

The Alaska Supreme Court decided that Congress intended to delegate the Assistant Secretary of the Interior for Indian Affairs authority to unilaterally create a "federally recognized tribe" at the village of Northway whose governing body possesses authority to create a "court" that may assert jurisdiction over petitioner and his children and exercise that jurisdiction to compel petitioner to share custody of the children with an alcoholic who engages in episodic binge drinking and in whose household one child previously was injured while playing unsupervised. The Alaska Supreme Court then remanded this action to the Alaska Superior Court to determine the state law question of whether "comity" requires the State of Alaska to assist the Northway "court" to enforce the "judgment" it has entered against petitioner.

Respondent argues that, because of the remand, the decision of the Alaska Supreme Court is not a final judgment for the purposes of 28 U.S.C. § 1257. However, respondent misunderstands the § 1257 final judgment requirement.

As § 1257 requires, the questions presented in the petition have been conclusively decided by the highest court of the State of Alaska. With respect to those questions, there is nothing more to be decided, either by the Alaska Superior Court on remand or by the Alaska Supreme Court. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975), this Court held that, for purposes of 28 U.S.C. § 1257, when the highest court of a state has conclusively decided a federal issue "the judgment of the state court on the federal issue is deemed final," even if

"there are further proceedings – even entire trials – yet to occur in the state courts. . . . " The Alaska Supreme Court's decision in this action is exactly that case.

Whether the Alaska Supreme Court conclusively decided the questions presented in the petition is to be determined by examining the entire record and considering the effect of the Alaska Supreme Court's decision under that court's rules of practice. *See Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946). The record indicates that, on remand, the Alaska Superior Court will not consider the questions the Alaska Supreme Court decided. And no matter what its outcome, the remand will not moot the controversy between the parties regarding those questions.

If petitioner prevails on the remand, the State of Alaska will not assist the Northway tribal court to enforce its "judgment". But petitioner and his children will remain subject to the jurisdiction of the Northway "court". And nothing will preclude respondent from asking the Northway "court" to enforce the "judgment" it has entered against petitioner.

In such a circumstance, under the Alaska Supreme Court's rules of practice, the doctrines of *res judicata* and collateral estoppel will preclude petitioner from challenging either the *de jure* existence of the Northway court or its authority to assert its jurisdiction over petitioner and his children. *See Bartlett v. State*, 948 P.2d 987, 991 (Alaska 1997) (*res judicata* bars a subsequent suit on the same claims between the same parties); *Rooney v. Rooney*, 914 P.2d 212, 216 (Alaska 1996) (doctrine of collateral estoppel prohibits a party in an action from litigating an issue in a second action that was decided in the first action).

The Questions Presented Are Properly Before the Court.

The Alaska Supreme Court squarely considered and explicitly decided each of the questions presented in the petition. *See* App. 11-14, 18-23. Because it did, this Court repeatedly has instructed that "it is irrelevant to inquire . . . when [the questions the Alaska Supreme Court considered and decided were] raised in a court below. . . . " *Orr v. Orr*, 440 U.S. 268, 274 (1979).

Not understanding that blackletter rule, respondent asserts that the first two questions were not raised below, and suggests that, because they were not, this Court should not review the Alaska Supreme Court's decision regarding them. However, petitioner did raise those questions below when respondent moved the Alaska Superior Court to dismiss the custody action petitioner filed in that court. Petitioner, citing *Native Village of Stevens, supra*, asserted in opposition to the motion to dismiss that the Northway village council had failed to "prov[e] that it is a self-governing tribe," and questioned the legal consequence of Assistant Secretary Deer's publication of her 1993 list. *See Baker v. John*, Alaska Superior Court No. 4FA-95-3103 CI, Supplemental Brief in Opposition to Motion to Dismiss (March 29, 1996) [hereinafter "Opposition to Motion to Dismiss"].[4]

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[4] Among the inaccuracies in her statement, respondent has represented to the Court that petitioner filed a false affidavit when he informed the Alaska Superior Court that he was "unaware of any [other] custody proceeding regarding the children . . . in Alaska, or any other jurisdiction." *See* Brief in Opposition to Petition, at 2. In fact, when she drafted his affidavit petitioner's counsel did not inform the Alaska Superior Court of the Northway "court's" "proceeding" because, as petitioner explained through counsel when he

The Recommendation of the "State of Alaska" That the Court Deny Plenary Review Should Be Considered by the Court in Its Proper Context.

Alaska is one of a minority of states in which the attorney general is appointed by and serves at the pleasure and under the direction of the governor.

Since the Native sovereignty movement began in Alaska, Alaska governors have responded in varying ways to the assertion that Native residents of more than 200 villages are "federally recognized tribes" whose governing bodies possess governmental authority, as well as sovereign immunity that permits the bodies and their business entities to disregard statutes the Alaska Legislature has enacted to protect the health, safety, and economic relations of all citizens of Alaska, including Native citizens who reside in Native villages.[5]

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opposed respondent's motion to dismiss, "[t]he Northway tribal council has not established that it is a 'court' for purposes of assuming jurisdiction over any matter, let alone the specific matter of custody. . . . " Opposition to Motion to Dismiss, at 18.

[5] In 1981 Governor Jay Hammond asked the secretary of the interior not to approve new Indian Reorganization Act constitutions. In 1984 Governor Bill Sheffield established a Task Force on Federal-State-Tribal Relations, which concluded that Native residents of Native villages were not "federally recognized tribes." *See Native Village of Stevens, supra* (discussion of Task Force report). In 1987 Governor Steve Cowper directed his attorney general to file *State of Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government* [hereinafter "*Venetie* lawsuit"], the action this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't, supra*, concluded. In part, Governor Cowper did so to establish that Native residents of Native villages were not "federally recognized tribes." *See State of Alaska ex rel. Yukon Flats School District v. Native Village of Venetie Tribal Government*, 856 F.2d

Several days after Tony Knowles, the current governor, assumed office the U. S. District Court for the District of Alaska in December 1994 issued an unpublished decision in the *Venetie* lawsuit in which the court held that the Indian residents of Venetie were a "federally recognized tribe". *Native Village of Venetie I.R.A. Council v. Alaska*, Nos. F86-0075 and F87-0051 (consolidated) (D. Alaska, Dec. 23, 1994) (Decision-Tribal Status). When the district court entered its final judgment, Governor Knowles directed his attorney general not to appeal the court's tribal status decision because, as the attorney general explained to the Alaska Legislature, "this administration has chosen not to battle over this issue" in order to "try to develop a better, happier relationship with the villages throughout Alaska." *Transcript of December 4, 1995 Hearing of Joint House and Senate Judiciary Committee*, Alaska State Legislature. And in a letter to the Legislature the attorney general reiterated that "the decision by the Knowles Administration to withdraw the challenge to federal recognition of tribes in Alaska was not driven by litigation considerations." The letter concluded with the admonition that "while people may disagree with the wisdom of this policy change, there should be no doubt

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1384, 1386 (9th Cir. 1988) (noting that the State's complaint "claimed that neither Native Village nor Venetie is an Indian tribe empowered to exercise tribal sovereignty"). Three years later Governor Cowper reversed course and issued an administrative order that announced that "[t]he State will treat as a tribe any Alaskan Native group that meets the common sense of the word." Adm. Order No. 123 (Sept. 10, 1990). But the order equivocated regarding the legal consequences Governor Cowper thought would flow from that treatment. In 1991 Governor Walter Hickel revoked Adm. Order No. 123. *See* Adm. Order No. 125 (Aug. 16, 1991).

that the Governor has the authority to adopt and implement the tribal status policy for his administration, just as his predecessors have done." Letter from Bruce Botelho, Alaska attorney general, to the Hon. Irene Nicholia (Jan. 26, 1996).

In this action, the governor directed his attorney general to inform the Court that the Alaska Supreme Court's decision "significantly advances the prospects for more cooperative, effective, and nonduplicative working relations between the state and tribal courts in Alaska." Brief for the State of Alaska, at 1. The governor was empowered to direct the attorney general to communicate the governor's view. But the doctrine of separation of powers "is implicit in Alaska's constitution." *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976). And pursuant to ALASKA CONST., art. II, § 1, the legislative power of the State of Alaska is vested in the Alaska Legislature. And it is the Legislature's legislative power, more than it is the governor's executive power, that will be diminished if the Court denies plenary review.

Because the Alaska Legislature meets annually for a 120-day session that convenes in January, it was not in session during the thirty day period Rule 37.2(a) afforded amici curiae to appear in support of the petition. However, the governor was aware when he directed the attorney general to appear in opposition to the petition that the leaders of the Legislature strongly support the petition. *See* Letter from Drue Pearce, president of the Alaska Senate, and Brian Porter, speaker of the Alaska House of Representatives, to the Hon. Ted Stevens, Frank Murkowski, and Don Young (Dec. 15, 1999), *reprinted at* App. 1. For that reason, in the unique context of this case, the attorney general's representation to the Court that the

"State of Alaska", rather than the governor of Alaska, urges that the petition be denied is a troubling disingenuity.[6]

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[6] When the Alaska Legislature convened on January 10, 2000, its leaders met to discuss the Alaska Supreme Court's decision and the governor's appearance in opposition to the petition. They decided to retain counsel to move the Court on behalf of the Legislature to accept a brief filed in support of the petition after expiration of the Rule 37.2(a) filing deadline.

Alaska State Legislature

[SEAL]

Senator Drue Pearce
President of the Senate

Representative Brian Porter
Speaker of the House

[Letterhead Omitted In Printing]

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December 15, 1999

Dear Senators Stevens and Murkowski and Representative Young:

For the past fifteen years, there has been growing controversy in Alaska regarding the questions of whether Native residents of rural villages are members of "federally recognized tribes" and whether any land in Alaska is "Indian country". The answers to those questions carry immense consequences for the continued ability of the Alaska Legislature to assert its jurisdiction throughout the expanse of Alaska in order to protect the health, safety and general well-being of all Alaskans, including Alaskans who are Alaska Natives residing in rural villages.

In 1998, in *Alaska v. Native Village of Venetie Tribal Government*, the United States Supreme Court held that Congress did not intend fee title land conveyed to native corporations pursuant to the Alaska Native claims settlement Act to be "Indian country." Yet because Governor Knowles decided that his administration would not contest the tribal status of the Native Village of Venetie, in *Venetie* the Supreme Court assumed, albeit without deciding, that the residents of Venetie were a "federally recognized tribe."

Last September, the Alaska Supreme Court announced its view. By a vote of 3 to 2, the court in *John v. Baker* held that the Athabascan residents of the village of Northway (and by inference, the Native residents of every other village in Alaska) are a "federally recognized tribe" for two reasons. First, in 1993, Assistant Secretary of the Interior for Indian Affairs Ada Deer published a list in the Federal Register that she asserted constituted federal recognition. And second, in 1994, the 103d Congress intended its enactment of the federally Recognized Indian Tribe List Act (FRITLA) to ratify Assistant Secretary Deer's action.

Because the Alaska Supreme Court decided questions of federal, rather than state law, the Office of Public Advocacy, which represents Mr. Baker, has retained Don Mitchell to petition the United States Supreme Court to issue a writ of certiorari and review the *John v. Baker* decision.

The dispute between the parties in *John v. Baker* involves a disagreement between two unmarried Native parents regarding the custody of their children. However, the

implications of the case are far broader. If Native residents of rural villages are "federally recognized tribes" for the purpose of empowering their government bodies to issue child custody decrees, they are "federally recognized tribes" for all other purposes, including sovereign immunity.

In 1996, Attorney General Botelho informed the Legislature that "[a] few native groups in Alaska have claimed sovereign immunity in response to efforts by [the Alaska Department of Environmental Conservation] to enforce the state's 'little superfund law,' AS 46.03" and that that "could be an area of dispute with tribes in the future."

The inability of the Alaska Legislature to enforce its environmental protection statues in rural Alaska is merely the tip of an ice berg of jurisdictional confusion if the United States Supreme Court does not reverse the *John v. Baker* decision. For that reason, it is our hope that the Legislative Council will appear before the Court as amicus curiae to request the Court to grant Mr. Baker's petition for certiorari. The purpose of this letter is to request that you appear, as Senator Stevens did in *Venetie*, as amici curiae to the petition for certiorari.

A brief by the three members of Alaska's Congressional delegation may be particularly influential with the Court because, more than any other members of the 103d Congress, it is your intent embodied in FRITLA that the Alaska Supreme Court has misconstrued. If the *John v. Baker* decision is correct, then with no notice either to members of the Alaska Legislature of any other Alaskans, and with no opportunity for public hearing, the members

of Alaska's Congressional delegation joined other members of the 103d Congress in enacting FRITLA by unanimous consent of the last evening of the Congress in order to create 226 "federally recognized tribes" in Alaska, each of which possesses sovereign immunity that permits its governing body and commercial business enterprises to disregard the laws of the State of Alaska.

We are confident that this was not your intent, nor was it the intent of any other member of the 103d Congress. If it was not, your request to the United States Supreme Court that it review the Alaska Supreme Court's decision in *John v. Baker* may have an important influence on the Court's decision whether to grant Mr. Baker's petition for certiorari.

Thank you for your attention to this request of considerable importance to the future of Alaska. Mr. Baker's petition for certiorari was filed on December 7. Pursuant to United States Supreme Court Rule 37.2(a), a brief by an amicus curiae must be "submitted within the time allowed for filing a brief in opposition," which is January 6, 2000.

Sincerely,

/s/ Drue Pearce
SENATE PRESIDENT

/s/ Brian Porter
SPEAKER OF THE HOUSE

(4)

No. 99-973

Supreme Court, U.S.
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In The

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JOHN BAKER,

Petitioner,

v.

ANITA JOHN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska

BRIEF FOR THE STATE OF ALASKA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF FOR THE STATE OF ALASKA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE STATE OF ALASKA AS *AMICUS CURIAE*

The State of Alaska has a substantial interest in the issues presented by the petition and in urging its denial. At the request of the Alaska Supreme Court, the State presented its views as *amicus curiae* in this matter below. In adopting the position urged by the State, the Alaska Supreme Court deferred to the federal recognition of Alaska's 200-plus tribes. The State has a continuing interest in the correctness of that result which resolved prior conflicts between state and federal law.

The Alaska Supreme Court also correctly held that Alaska tribes retain jurisdiction that is concurrent with the State of Alaska over child custody disputes involving tribal member or membership-eligible children. Further, it embraced the State's suggestion that the high court articulate comity criteria for recognition of tribal court proceedings and orders and, in so doing, provided important guidance to the State's lower courts. Thus, the decision below significantly advances the prospects for more cooperative, effective, and nonduplicative working relations between state and tribal courts in Alaska.

Finally, the State has an interest in clarifying for the Court that the entity representing petitioner, the Office of Public Advocacy, does not represent the State's interests or legal positions in this matter. Pursuant to Alaska law, the Office of Public Advocacy represents needy individuals in particular categories of cases. *See* Alaska Stat.

§ 44.21.410. For these reasons, the State seeks to aid the Court's consideration of the petition.

REASONS FOR DENYING THE WRIT

Petitioner urges review of questions that do not meet this Court's certiorari criteria. *See* Sup. Ct. R. 10. The petition seeks review of the decision of the Alaska Supreme Court that Alaska's tribes enjoy federal recognition. Contrary to the suggestions of the petition, Pet. 22, that decision brings harmony, rather than conflict, to state and federal law on this point.

As amici to the proceedings before the Alaska Supreme Court, the State, the United States, and Tribal governments throughout Alaska all urged the court to conform state law to federal law by revisiting its decision in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988) (holding that the federal government had not recognized most Alaska Native Villages as tribes).[1] The Alaska Supreme Court reviewed the intervening actions of the federal government and correctly concluded that *Stevens* had been overtaken by events:

> Through the 1993 tribal list and the 1994 Tribe List Act, the federal government has recognized

[1] In the proceedings below, the parties did not dispute the federally recognized status of the Native Village of Northway. In fact, petitioner, Mr. Baker, initiated his custody dispute in the Northway tribal court.

> the historical tribal status of Alaska Native villages like Northway. In deference to that determination, we also recognize such villages as sovereign entities.

Pet. App. 22. This holding does not warrant review.

Neither does the narrow statutory interpretation issue presented by the petition warrant review. The Alaska Supreme Court properly determined that the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, does not apply to this parental custody dispute. ICWA's provisions apply only to "child custody proceedings" as defined by the Act. *See* 25 U.S.C. § 1911, § 1918. Section 1903 of ICWA specifically excludes from the definition of child custody proceedings the award of custody to a parent in a divorce proceeding. Like other appellate courts, the Alaska Supreme Court interpreted ICWA's divorce exception to apply to custody disputes between unmarried parents. There is no conflict between the Alaska Supreme Court and other state courts of last resort, or between the Alaska Supreme Court and the circuit courts of appeal, on this point of statutory interpretation.

In short, the State agrees with the Alaska Supreme Court's decision in this case and welcomes the resolution that it brings to State-Tribal relations in Alaska. The petition should be denied because this case does not satisfy any of the Court's criteria for review.

I. The Alaska Supreme Court Correctly Applied This Court's Decision In *United States v. Holliday* To Conclude That The Political Branches Of The Federal Government Have Recognized Alaska Tribes.

The State of Alaska and the Alaska Supreme Court consistently have maintained that whether there are tribes in Alaska is a federal matter principally committed to the political branches of the federal government. *See Atkinson v. Haldane*, 569 P.2d 151, 162-163 (Alaska 1977) (federal executive branch determination that Metlakatla Indian Community is an Indian tribe is a nonjusticiable political question). The Alaska Supreme Court's *Atkinson* rule derives directly from this Court's decision in *United States v. Holliday*, 70 U.S. 407 (1865). *Holliday* established that,

> [i]t is the rule of this court to follow the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

Id. at 419.[2] In keeping with *Holliday* and *Atkinson*, the Alaska Supreme Court properly reviewed the actions of the Interior Department and Congress to ascertain whether Alaska tribes are federally recognized.

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[2] Other federal courts have described tribal status determinations as within the "primary jurisdiction" of the Interior Department, *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 59 (2nd Cir. 1994), and as within the Interior Department's congressionally delegated authority. *Id.* at 59; *James v. U.S. Dep't of Health and Human Services*, 824 F.2d 1132, 1137 (D.C. Cir. 1987).

As the Alaska court observed, before 1993 neither the Department of the Interior nor Congress had indicated unequivocally whether Alaskan Native entities, other than the Central Council of Tlingit and Haida Indian Tribes of Alaska and the Metlakatla Indian Community, were federally recognized tribes.[3] In early 1993, the Solicitor of the Department of the Interior issued a comprehensive opinion on the status of Alaska Natives and Alaska Native lands. Solicitor of the Department of Interior, *Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers*, Sol. Op. M-36975 (Jan. 11, 1993). Although the Solicitor's Opinion concluded that there were tribes in Alaska, it did not identify which entities or villages so qualified. *Id.* at 58-59. That question was answered by the Interior Department's 1993 tribal entities list. 58 Fed. Reg. 54,364 (Oct. 21, 1993). The preamble to the 1993 list states that,

> This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.

58 Fed. Reg. 54,366 (Oct. 21, 1993). The Alaska Supreme Court correctly read the Interior Department's list as confirming the Department's recognition of the tribal status of Alaska villages. Pet. App. 20.

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[3] *See generally* 58 Fed. Reg. 54,364-69 (Oct. 21, 1993).

Following the Interior Department's publication of the 1993 list, Congress enacted the 1994 Federally Recognized Indian Tribe List Act (List Act), Pub. L. 103-454, Title I, 108 Stat. 4792 (codified at 25 U.S.C. §§ 479a-479a-1 (1994)). The List Act compelled the Alaska Supreme Court's conclusion that it must defer to the federal government's recognition of Alaska tribes.

The List Act was precipitated, in part, by Congress' concern that the Central Council of Tlingit and Haida Indian Tribes of Alaska, an Alaska regional tribe recognized by Congress in 1935, Act of June 19, 1935, 49 Stat. 388 as amended, had been dropped from the Interior Department's 1993 list of recognized tribes. H. Rep. No. 103-781, *reprinted in* 1994 U.S.C.C.A.N. 3769. In response, the List Act reserved to Congress the sole authority to terminate tribes. 25 U.S.C. § 479a, Finding (4).

The Act further required that the Secretary of the Interior Department annually publish in the Federal Register "a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 479a-1(a). It also confirmed the Secretary's authority to recognize tribes. 25 U.S.C. § 479a, Finding (3). The List Act's findings clarified that the Secretary's list is to reflect "all federally recognized tribes," and that the United States "maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes." 25 U.S.C. § 479a, Findings (6) and (2).

In a corollary action, Congress restored the Central Council of Tlingit and Haida Indian Tribes of Alaska to

the Secretary's list. Tlingit and Haida Status Clarification Act, Pub. L. 103-454, Title II, 108 Stat. 4792 (codified at 25 U.S.C. §§ 1212-1215 (1994)). The Tlingit & Haida Act not only reaffirmed the Central Council of Tlingit and Haida as a federally recognized tribe, 25 U.S.C. § 1213, it also expressly acknowledged the "government-to-government relationship between the United States and other federally recognized Alaska Native tribes." 25 U.S.C. § 1214(a). Since Congress' findings in connection with the Tlingit & Haida Act accepted the Interior Department's 1993 list as *the* list of federally recognized tribes, 25 U.S.C. § 1212(2), the "other federally recognized Alaska Native tribes" referenced in section 1214(a) are those tribes that appear on the 1993 list.

Hence, the List Act together with the Tlingit & Haida Act confirmed that, but for the omission of the Central Council of Tlingit and Haida, Congress considered the Interior Department's list to be definitive as to Alaska tribes. The federal district court of Alaska so interpreted the combined actions of the Interior Department and Congress:

> Congress repudiated a decision by the Secretary to remove two Alaskan tribes from the Secretary's 1993 list of recognized tribes. Congress did not, however, repudiate any other portion of the 1993 list. Congress actually referred to the 1993 list and ordered the two tribes returned to it. Tribe List Act, section 202(2). *This leads to the conclusion that Congress approved of this list.*

Native Village of Venetie I.R.A. Council v. State of Alaska, No. F86-0075 CIV (HRH) (D. Alaska, Sep. 20, 1995) (emphasis added).

Assuming *arguendo*, that there was prior doubt as to the Secretary's authority to identify and list federally recognized tribes, such doubts (and petitioner's claims, Pet. 23-26), are resolved by the List Act. Plainly, the post-List Act lists of federally recognized tribes were promulgated pursuant to the Secretary's delegated authority and have Congress' blessing. If Congress did not perceive that the Secretary of the Interior had exceeded his delegated powers, this Court should feel no need to review petitioner's claims in this regard.

II. The Petition Misstates The Jurisdictional Consequences Of The Alaska Supreme Court's Decision That Alaska Tribes Retain Inherent Jurisdiction To Adjudicate The Custody Of Member And Membership-Eligible Children.

In an effort to paint a jurisdictional conflict where none exists, petitioner mischaracterizes the jurisdictional consequences of the Alaska Supreme Court's decision. The decision does not, as suggested by the petition, empower Alaska tribes to "supersede" the jurisdiction of Alaska courts to adjudicate child custody disputes. Pet. 21. Instead, the decision confirms the jurisdiction of the Alaska state courts, concurrent with Alaska tribal courts, to hear child custody disputes involving tribal children. Pet. App. 45-50.

Indeed, recognition of concurrent jurisdiction between state and tribal courts provides improved access to judicial resolution of parental custody disputes, especially for rural Alaskans. When coupled with the newly articulated comity criteria, it will also reduce parents'

forum shopping in these cases. The Alaska Supreme Court's comity holding is thus an appropriate state law accommodation of the State's efforts to enhance cooperation between state and tribal court systems in Alaska.

III. The Alaska Supreme Court's Interpretation Of The Indian Child Welfare Act Is Consistent With Other Courts' Interpretation Of The Same Language.

The Alaska Supreme Court held that ICWA did not apply to the parental custody dispute between Ms. John and Mr. Baker, relying on both statutory language and legislative history. Pet. App. 11-14. The Ninth Circuit and the state courts of last resort that have considered whether custody disputes between unmarried parents are excluded from the coverage of ICWA have reached the same conclusion.

Congress created an express exception to the types of child custody proceedings governed by ICWA for "an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. § 1903(1). The Alaska Supreme Court determined that all parental custody disputes fall within this exception. The supreme courts of Nebraska and South Dakota also have concluded that ICWA does not apply to a custody dispute between unmarried parents. *Walksalong v. Mackey*, 549 N.W.2d 384, 387 (Neb. 1996) (ICWA inapplicable to custody dispute between parents in which one of the parents has physical custody of the child); *Application of Defender*, 435 N.W.2d 717, 721 (S.D. 1989).

The Court of Appeals for the Ninth Circuit also has considered the question of ICWA's applicability to a parental custody dispute between unmarried parents. *Confederated Tribes v. Superior Court*, 945 F.2d 1138 (9th Cir. 1991). It concluded that the definition of child custody proceedings "does not include the resolution of the longer-term custody dispute between [these] parents." *Id.* at 1140 n.3. *See also* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979); B. J. Jones, *The Indian Child Welfare Act Handbook* 14 (1995); Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power over Children*, 83 Minn. L. Rev. 927, 950 (1999). The State has found no authority to the contrary. This issue does not warrant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 99-973

IN THE
Supreme Court of the United States

JOHN BAKER,
Petitioner,

v.

ANITA JOHN,
Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court Of The State Of Alaska

MOTION TO FILE OUT OF TIME AND FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF DRUE PEARCE, PRESIDENT OF THE ALASKA SENATE, AND BRIAN PORTER, SPEAKER OF THE ALASKA HOUSE OF REPRESENTATIVES, IN SUPPORT OF PETITIONER

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MOTION TO FILE OUT OF TIME AND FOR LEAVE TO FILE AMICI CURIAE BRIEF

The movants, Drue Pearce, President of the Alaska Senate, and Brian Porter, Speaker of the Alaska House of Representatives ("Legislative Leadership"), in their official capacities, seek leave to file this *amici curiae* brief, out of time, because of the unique circumstances associated with the meeting times of the Alaska State Legislature. The Alaska State Legislature only convenes for a 120-day period each year. At other times of the year, the Legislators scatter to the four corners of Alaska and elsewhere. Meetings between legislators as a group when not in session is often impractical. This year, the Legislature did not convene until January 10, 2000, a few days after the January 6, 2000 deadline to file an *amici curiae* brief (or request for extension, Sup. Ct. R. 30.2).[1]

The Court should grant this motion to file out of time for four reasons. First, the Legislative Leadership did not want to take any action in this case until it had meet with other members of the Legislature, including in the caucuses most interested in this issue. The opportunity to do so did not come until after January 10, 2000. As soon as this consultation occurred, the Legislative Leadership instructed that counsel file these motions and brief as soon as possible.

Second, the Legislative Leadership, and the majority of the State Legislature they represent, has an unique interest in this proceeding. The Legislature considers and passes the state laws, specifically the state child custody laws, that are being essentially preempted by the so-called laws -- of the

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[1] This Court has granted motions to file out of time numerous times, although it is undoubtably not the routine practice. *See, e.g., American Foreign Serv. Ass'n. v. Garfinkel*, 489 U.S. 1050 (1989) (granting motion of U.S. Senate and of Speaker and Leadership Group); *Mansell v. Mansell*, 488 U.S. 906 (1988) (granting motion of U.S. Solicitor); *Livadas v. Aubry*, 511 U.S. 1028 (1994) (granting motion of Food Employers Council).

hundreds of Alaskan Native entities -- given life by the Alaska Supreme Court case under appeal here. For example, the Legislature passed Alaska Stat. § 25.20.060, which sets up a procedure for resolving child custody disputes, including the principles that should guide the Superior Court's decisions (e.g., the best interest of the child). This Section also addresses such issues as grandparent visitation (added in 1995), whether either parent is entitled to a preference in the award of custody, shared custody, and the effect of domestic violence on the issue (added in 1996). If the Alaska Supreme Court decision stands, the Legislative Leadership will have no means to ensure that the policies behind the Legislature's actions will apply to all citizens of Alaska.

Third, part of the impetus for the Legislative Leadership to file this brief is the fact that the State of Alaska, acting at the behest of the Governor and through its Attorney General, filed an *amicus curiae* brief in opposition to the Petition for Certiorari (i.e., a position diametrically opposed to the Legislative Leadership's position). The State's brief suggests that the government of the State of Alaska supports the Respondent and wants to uphold the Alaska Supreme Court's decision. But that brief represents the views of only one branch of the Alaska government. The State did not file its opposition brief until January 6, 2000, so the Leadership could not know that the State was going to file such a brief until that time. For the Court to hear the views of another branch of Alaska's government, it will have to grant this motion.

Fourth, the enclosed *amici curiae* brief is relatively short and essentially expresses the Leadership's support of the Petition for Certiorari. The brief informs the Court of the ramifications of the Alaska Supreme Court decision, if allowed to stand, particularly those effects on the Alaska Legislature. Allowing this brief to be filed out of time will not prejudice any party, as no party opposing the Petition for Certiorari would have seen this brief before having to file

their own briefs (they would have been due on the same day under Sup. Ct. R. 30.2).[2]

For these reasons, the Legislative Leadership respectfully asked that the Court grant leave to file this brief out of time.

For the same reasons as discussed above, the Legislative Leadership requests that this Court grant leave to file this *amici curiae* brief. *See* Sup. Ct. R. 37.2. The Petitioner consents to the filing of the Brief. See Letter from Donald C. Mitchell to Theodore W. Popely (January 21, 2000), App. 24a. The Respondent, however, apparently believes that this Court should have the views of only two of the three branches of the Alaska government (the Court through its opinion and the Governor through the State's *amici curiae* brief) and has refused consent. Thus, the Legislative Leadership seeks leave to file the following Brief.

The Legislative Leadership recognizes that such motions are disfavored. Sup. Ct. R. 37.2(b). But in this situation, the Court would benefit from hearing from all the branches of the Alaska government, notwithstanding the Respondent's desire to silence one of those voices. Especially considering that the following brief is relatively short and no party will suffer prejudice from the Court accepting this Brief, the Court should grant leave that this Brief be filed.

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[2] To avoid gaining an unfair advantage from filing after the Respondent's opposition brief was due, no attorney preparing this brief read the Respondent's opposition brief before preparing this Brief.

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AMICI CURIAE BRIEF OF DRUE PEARCE, PRESIDENT OF THE ALASKA SENATE, AND BRIAN PORTER, SPEAKER OF THE ALASKA HOUSE OF REPRESENTATIVES, IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Amici Curiae are the President of the Alaska State Senate and the Speaker of the House of Representatives of the Alaska Legislature (i.e., the Legislative Leadership of the State of Alaska).[3] Representing the majority of 20 Alaska Senators and 40 Representatives duly elected by all Alaska citizens, the Legislative Leadership represents the views of the majority of the Legislature. The Legislature has the duty under the Alaska Constitution to formulate and enact laws in the best interests of the State and its constituents.

Following the Alaska Supreme Court's decision in *John v. Baker*, 982 P.2d 738 (Alaska 1999), the case under review here, hundreds of Native village governments may now be exempt from the application of numerous state laws. Thus, the Legislative Leadership is concerned that a vast number of Alaska Natives are left unprotected by the State's uniform structure of laws, subject instead to no law at all or any number of rules set by 226 different village tribal organizations.[4]

The astonishing lack of governing rules is not limited to domestic relations, but may extend to all the "same inherent and delegated authorities available to other tribes." *John*, 982 P.2d at 753 (*quoting* 58 Fed. Reg. 54,366 (1993)).

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[3] Amici *curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.5

[4] *See, e.g.*, Letter from Alaska Attorney General Bruce Botelho to Representative Gail Phillips (Jan. 11, 1996), attached as an appendix to this brief ("Botelho Letter"), App. 9a-14a.

The Alaska Legislature will be the body forced to address the uncertainty and confusion that will inevitably result from the newly recognized sets of rules. Such uncertainty limits the Legislature's ability to regulate matters of vital importance to the citizens of Alaska and compromises its sworn duty to further the public interest. In addition to severely hindering the Legislature's role as policymaker for the State, the *John v. Baker* decision will inevitably spawn substantial litigation over precisely which state laws and regulations remain applicable to Native villages and which do not. Litigation over sovereign immunity status will drain the limited resources of both the State and Native communities, resources that could be used better for much-needed services.

Contrary to representations made to this Court by the State Department of Law in its *amici* filing, the Legislature is the body that most closely represents the views of the State's citizenry, and it does support the petition for certiorari. Mr. Baker has convincingly demonstrated why the decision below warrants review by the Court. *Amici* is filing separately to emphasize the difficulties that the decision poses for the State's lawmaking body and the Legislature's ability to fulfill its responsibilities to the Alaska citizens. As the branch of government most directly impacted by the decision, the Legislature can offer a unique perspective on both the Legislative history leading to this dispute and the likely consequences of a failure to review the lower court decision. For these reasons, the views of *amici* should further inform the Court's judgment as to whether to grant the petition.

ARGUMENT - REASONS FOR GRANTING THE PETITION[5]

The legal issues presented in this case transcend the State of Alaska and constitute precisely the sort of "important question of federal law" contemplated by Supreme Court Rule

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[5] Because of the shortness of this Brief, no summary of the argument is included.

10(c). The Alaska Supreme Court's interpretation of the inapplicability of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 ("ICWA"), to this case presents an issue of such wide-reaching national scale as to merit review by this Court. For example, the State of Alaska has cited several decisions on this issue by other state and circuit courts,[6] and the United States has weighed in as an *amicus curiae* in the case before the Alaska Supreme Court. Should the decision stand, the likely result is a significant departure from the states' traditional jurisdictional structure with respect to child custody determinations.

The Alaska Supreme Court ignored the plain meaning of the ICWA. Consistent with legislative history, Congress provided an exception to the application of ICWA in child custody disputes for "an award, ***in a divorce proceeding***, of custody to one of the parents." 25 U.S.C. § 1903(1) (emphasis added). The Alaska Supreme Court applied the exception, ignoring the fact that Mr. Baker and Ms. John had never been married and were not involved in a "divorce proceeding." *John*, 982 P.2d at 743. Congress' limitation of the exception to "divorce proceedings" should be read as it is written. Judicial expansion of the plain meaning contained in the statute is unnecessary and inappropriate. *Amici Curiae* agrees with Petitioner on this issue.

Amici Curiae also supports the Petitioner's argument that the Alaska Supreme Court has fundamentally misconstrued the application of both the Assistant Secretary of the Interior for Indian Affairs' published list of Native entities and the 1994 Federally Recognized Indian Tribe List Act, 25 U.S.C. § 479a – 479a-1, ("FRITLA"). Prior to 1993, no federal statute had ever recognized Native entities as "tribes" in Alaska, except for inclusion for specific and limited federal programs such as ICWA. In addition, no

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[6] See State of Alaska amici curiae brief at 9.

Native village had petitioned the Assistant Secretary for recognition as a tribe, as required by federal regulation.

To confer tribal status to a Native entity, the Secretary must have been delegated that authority explicitly by Congress. Legislative history confirms that the Assistant Secretary unilaterally usurped that authority in 1993. Congress did not explicitly delegate that authority, and it did not affirm the Assistant Secretary's actions in FRITLA. Congress has long recognized Alaska Native villages as "tribes" only for the limited purpose of receiving certain program benefits from the federal government. That inclusion cannot now be read to demonstrate Congress' sudden departure from historical treatment of Alaska Natives by naming them in the 1990's as fully sovereign "tribes."

Although the case at bar involves a custody disagreement between two unmarried Native parents, the implications of the Alaska court's ruling are far broader. Should Native residents of rural villages be considered "federally recognized tribes" for the purpose of the issuance of child custody decisions, then they may be "federally recognized tribes" for all other purposes, including sovereign immunity.

Newly conferred sovereign immunity could apply to all of the 226 Native villages in Alaska. In addition to domestic relations, a wide range of state laws and regulations could be virtually invalidated for a significant number of Alaska citizens. If the Alaska Supreme Court's ruling stands and Native villages are afforded tribal status for all purposes, sovereign immunity may exempt tribes from compliance with state law.

For example, currently on appeal before the Alaska Supreme Court is a case where the widow of a man working for the village of Mekoryuk IRA Council sought workers compensation benefits after he was killed in an accident while on the job. *Cigna Ins. Co. et al. v. Moses*, S-8908/8918 (Alaska Supreme Court 1999). The Alaska Workers

Compensation Board denied the widow benefits because Mekoryuk was found to be a federally recognized tribe possessing sovereign immunity, and was therefore immune from suit for workers compensation death benefits. In addition, the state Attorney General has acknowledged that some Native entities have already claimed sovereign immunity from application of the State's environmental protection laws. *See* Botelho Letter, App. 16a.

The decision of the Alaska Supreme Court undercuts a significant premise on which the Legislature has patterned its governance for much of the state and its citizens. The implications of this case for the lawmakers of this State are huge. From domestic relations to workers compensation to environmental protection and beyond, the Alaska Legislature has been placed in an untenable position. Sworn to protect the interests of the public in a fair and equitable manner, the lawmakers are now forced to reconsider the application of every law that has been considered and passed and each that will be.

CONCLUSION

For the reasons discussed above, and those stated in the Petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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OFFICE OF THE ATTORNEY GENERAL

January 11, 1996

The Honorable Gail Phillips
Alaska House of Representatives
State Capitol
MS 3100
Juneau, Alaska 99801

Dear Speaker Phillips:

At the conclusion of the Joint House-Senate Judiciary Committee hearing on tribal status held on December 4, 1995, I pledged to provide additional information about this important issue. This information is also being provided to legislators who did not participate in the committee hearing as a follow-up to my letter of November 27, 1995, on tribal status issues.

Let me emphasize once again that the decision by the Knowles Administration to withdraw the challenge to federal recognition of tribes in Alaska was not driven by litigation considerations. Instead, it was motivated by a commitment to working with Alaska villages to achieve a healthier, safer environment in which the community is an active participant

in solutions. Litigation over the issue of tribal status was viewed as a major impediment to this state-local partnership.

Nevertheless, the Administration's decision to not pursue the litigation over tribal status is also supported by events that, taken together, lead one to conclude that the probability of prevailing in the federal courts was extremely low. Very few human endeavors are static. In this instance, litigation over tribal status began in the 1980's because, in the absence of any clear federal expression that tribes existed in Alaska, the state was unwilling to accept each and every assertion of tribal status. As discussed further below, there has been extensive federal activity in the last two years that justified a fundamental reevaluation of the state's posture in the litigation.

THE FRAMEWORK FOR FEDERAL RECOGNITION OF TRIBES

Historically, the Alaska Supreme Court has held that for the most part, except far Metlakatla, no tribes exist in Alaska. The court extended sovereign immunity to Metlakatla in *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977), holding:

> Once the [federal] executive branch has determined that the Metlakatla Indian Community is an Indian tribe, which is a nonjusticiable political question, the community is entitled to all of the benefits of tribal status.

569 P.2d at 163.

More recently, the court has declined to find sovereign immunity or has concluded that, if it did exist, it was waived by the tribe. These cases include *Nenana Fuel v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992); *Hydaburg Coop. Ass'n v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992); *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988); and *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983). No case, however, has questioned the fundamental holding of *Atkinson v. Haldane*.

Four events have occurred since the Alaska Supreme Court's last decisions in 1992 that suggest the court would, if presented the question, decide tribal status issues differently today, in keeping with its decision in *Atkinson*. Those events are: (1) the Secretary of Interior's tribal listings published in 1993 and 1995; (2) Congress' enactment of the Federally Recognized Indian Tribe List Act of 1994; (3) Judge H. Russel Holland's decision in *Native Village of Venetie v, State*, No. F86-0075 CIV (HRH), issued December 23, 1994, holding that the Native Village of Venetie Tribal Government is an Indian tribe under the common law criteria; and (4) Judge Holland's decision in the same *Venetie* case on the tribal status of Fort Yukon issued on September 20, 1995.

Department of Interior's 1993 and 1995 Tribal Lists

In 1993, the executive branch of the federal government took a significant step intended to remove any ambiguity as to the tribal status of certain Alaska Native entities. On October 21, 1993, the Secretary of Interior published a list of more than 220 Alaska Native villages identified as having the same status as tribes in the contiguous 48 states. The preamble to the 1993 list expressly declared:

> The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b) and to *eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states*. Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental

> status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to the other tribes; and are subject to the same limitations imposed by law on other tribe.

58 Fed. Reg. 54365-54366 (Oct. 21, 1993) (footnote omitted; emphasis added).

The tribal list published by the Secretary on February 16, 1995, reinforces this intent. The preamble to the 1995 list states that it constitutes the list of "federally acknowledged tribes in the contiguous 48 states and in Alaska." 60 Fed. Reg. 9250 (Feb. 16, 1995). The preamble further points out that subsequent to the publication of the 1993 list, Congress enacted the List Act of 1994 in which "Congress confirmed the Secretary's authority and responsibility to establish a list of Indian tribes and mandated that he publish such a list annually." The updated 1995 list was published in response to that Congressional mandate. 60 Fed. Reg. at 9251.

The List Act of 1994

In late 1994, Congress was called upon to address the 1993 tribal list because of the Department of Interior's failure to include two tribes on the earlier list. One of the excluded tribes was the Central Council of Tlingit and Haida Indian Tribes of Alaska.

The result was enactment of the "Federally Recognized Indian Tribe List Act of 1994." Public Law 103-454; 25 U.S.C. 479a. In the List Act of 1994, Congress directed that the Secretary annually publish a list of federally recognized tribes; under the Act, once recognized, an Indian tribe may be terminated only by an act of Congress. Title II of the Act noted that the Secretary's 1993 list did not include the Central

Council and expressly reaffirmed the federal recognition of that tribe.

The House Natural Resources Committee report accompanying the legislation discusses the October 21, 1993, list of Alaska Native tribes and notes the continuing controversy over the existence of "Indian country" in Alaska. House Report No. 103-781; 1994 *U. S. Code Cong. and Adm. News*, p. 3768. The committee emphasized that the Act is neutral on the Indian country issue: "The Act merely requires that the Secretary continue the current policy of including Alaska Native entities on the list of Federally recognized Indian tribes which are eligible to receive services." *Id.* at 3771.

The December 23, 1994, Decision in the Venetie Case

On December 23, 1994, Judge Holland ruled that the Native Village of Venetie Tribal Government (encompassing the Native Village of Venetie and Arctic Village) is a tribe based on the federal common law criteria. Those criteria are: (1) the group is a group of Indians of the same or similar race; (2) it is united in a community; (3) it operates under one leadership or government; (4) it inhabits an area of some reasonable definition; and (5) it is the modern day successor to an historical sovereign entity which exercised at least minimal government functions. In applying these criteria to the evidence presented at trial, the court took a broad view of each one making it unlikely that any village would fail to meet the test.

The September 20, 1995, Decision in the Venetie Case (Fort Yukon)

The 1993 and the 1995 tribal lists, as well as the List Act of 1994, were considered by the U.S. District Court for Alaska when it was called upon to decide Fort Yukon's tribal status in the *Venetie* case. The state contested Fort Yukon's inclusion on the 1993 and 1995 lists because, in identifying the listed villages, the Secretary of interior had failed to follow the Department of Interior regulations necessary to achieve tribal recognition.

In a decision issued on September 20, 1995, the court rejected the state's argument. The court held that the Secretary of Interior has the power to recognize tribes as a result of the historical acquiescence of Congress. The federal regulations established a procedure for unrecognized tribes themselves to initiate proceedings to gain the Secretary's recognition. However, the court concluded, this is not the exclusive means by which a tribe may receive federal recognition, and "[t]he Secretary himself need not use this regulatory scheme, but may recognize a tribe due to his historically acquiesced power". Order, September 20, 1995, at 9. The court found that the ambiguity surrounding the status of the Alaskan entities on the tribal lists published by Interior from 1982 to 1988 was resolved by the publication of the October 21, 1993, list: "the executive's intent was clearly announced" on that date. *Id.* at 8. Thus, as of that date, the Native Village of Fort Yukon (as well as the other entities on the list) became a federally recognized tribe.

The court found support for its ruling on the tribal status of Fort Yukon in the List Act of 1994, stating:

> Congress repudiated a decision by the Secretary to remove two Alaskan tribes from the Secretary's 1993 list of recognized tribes. Congress did not, however, repudiate any other portion of the 1993 list. Congress actually referred to the 1993 list and ordered the two tribes returned to it. Tribe List Act, section 202(2). This leads to the conclusion that Congress approved of this list.

Order, September 20, 1995, at 10.

On October 20, 1995, the state moved for reconsideration of the court's decision, thus precipitating a careful policy review by Governor Knowles. The state's motion for reconsideration was later withdrawn. The plaintiffs also moved for reconsideration, arguing that Fort Yukon was a federally recognized tribe by virtue of its inclusion on the Department of Interior's tribal lists published from 1982 to

1988. On December 12, 1995, Judge Holland issued a decision reaffirming his previous ruling. The court stated that it had reconsidered its order of September 20 on the tribal status of Fort Yukon and concluded that it had made no error of fact or law in that order. The court reiterated its holding that as of October 21, 1993. Interior clearly declared the listed villages, including Fort Yukon, to be federally acknowledged tribes.

The Status of the "Indian Country" Issue

In two recent decisions issued by Judge Holland, the *Venetie* case and the *Kluti Kaah* case, the court held that ANCSA lands are not Indian country. Both of these cases have been appealed to the Ninth Circuit Court of Appeals. As I stated in my November 27, 1995, letter, the Knowles Administration will defend Judge Holland's decisions in the Indian country cases on appeal.

The *Venetie* Indian country case arose out of Venetie's effort to impose a business activities tax on a school construction project in the village. The ability of a tribe to tax depends on the tribe having a territory, *i.e.*, Indian country; over which it exercises jurisdiction. In August 1995, Judge Holland determined that the ANCSA lands owned by Venetie are not Indian country. Thus, the tribe cannot impose a tax on construction projects on ANCSA lands.

On November 28, 1995, Judge Holland ruled that the Kluti Kaah Native Village of Copper Center neither owns nor occupies land constituting Indian country. Therefore, Kluti Kaah lacks jurisdiction to impose a business activities tax on the section of the TransAlaska Pipeline System running through the area.

The essence of the Venetie and Kluti Kaah Indian country decisions is: (1) the test for Indian country is whether the land has been validly set apart for the use of Indians as such, under the superintendence of the federal government; (2) it is the tribe, not the land, that must be under federal superintendence; (3) following ANCSA, Alaska Native tribes are not subject to the degree of Congressional and Executive agency control that

evidences an intention that the federal government, rather than the state, be the dominant political institution in the area and are therefore not under the superintendence of the government; and (4) under the terms and structure of ANCSA, land conveyed to ANCSA corporations cannot be said to have been set aside for the use of Natives *as such*, and therefore is not Indian country.

While the decision to not pursue litigation over tribal recognition may focus the debate on the Indian country issue, it does not dilute the state's arguments on that issue. The federal court has already rejected arguments that tribal status establishes the existence of Indian country. As stated by the Department of Interior in its preamble to the 1995 list, "[i]nclusion on the list does not resolve the scope of powers of any particular tribe over land or non-members. It only establishes that the listed tribes have the same privileges, immunities, responsibilities and obligations as other Indian tribes under the same or similar circumstances . . ." 60 Fed. Reg. at 9251. The department then noted the opinion of the Solicitor of the Department of Interior, which concluded, construing general principles of federal Indian law and ANCSA,

> that ANCSA largely, controls in determining whether any territory still exists over which Alaska villages might exercise governmental powers. We also conclude that, notwithstanding the potential that Indian country still exists in Alaska in certain limited cases, Congress has left little or no room for tribes in Alaska to exercise governmental authority over land or nonmembers.

60 Fed. Reg. at 9251 n.1 (quoting Opinion of the Solicitor of the Department of Interior, Thomas Sansonetti, M-36975, at 108, January 11, 1993). *See also* 58 Fed. Reg. at 54366 n.1.

SUMMARY OF ISSUES ADDRESSED

During the December 4 hearing, additional information was requested on a number of issues. One of the items requested was a list of tribal powers. Many of the issues discussed below concern the scope of powers of a recognized tribe without Indian country (*i.e.*, tribal authority over internal affairs and domestic relations of tribal members; the treatment of tribes under the Clean Water Act; sovereign immunity; alcohol control; criminal law enforcement; Indian gaming; and fish and game management). Questions were also raised concerning the relationship of certain sections of the Statehood Act and the Alaska Constitution to tribal recognition; the federal statutes in which Alaska Native villages are defined as tribes for specific federal purposes; and the budgetary impacts of the tribal status litigation. These questions are discussed below as well.

Before going into those issues, however, let me reiterate what I stated in my letter of November 27 on tribal recognition generally. Tribal recognition is a federal, not a state, function. Tribal recognition means that Alaska's tribes are eligible to receive funding and services from the federal government, are able to set rules for tribal membership and the domestic relations of their own members, and are immune from suit. Governmental powers such as the right to tax, manage fish and game, and prosecute criminal cases are only applicable in Indian country; in other words, without Indian country, tribes have no jurisdiction to exercise such powers.

Tribal Authority over Internal Affairs

It is well established in federal Indian law that each tribe has the power to set its own membership criteria. Identification of a person as a member of an Indian tribe is an issue solely within the control of the tribe, and perhaps the individual. Tribes can also choose the structure within which they govern themselves. They may consider traditional tribal councils, IRA councils, or some form which combines traditional and modern factors. Traditional councils and IRA councils are not

subject to most state laws. Limitations on tribal action are governed by the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301, and by Congress.

Child Protection - Indian Child Welfare Act Matters

The Division of Family and Youth Services, Department of Health and Social Services, responds to reports of harm regarding child abuse and neglect. Reports concerning Native children involve those living in villages, those living in urban areas, and those whose families travel back and forth. All of the villages listed in ANCSA have long been recognized as "Indian tribes" for purposes of the Indian Child Welfare Act (ICWA). *See* 25 U.S.C. 1903(8). Therefore, state acceptance that the listed Native villages are tribes does not change DHSS's longstanding practice of notifying tribes regarding Alaska Native children who come under the child protection statutes and the tribes' right to participate in state court child protection cases.

Not all tribes participate in state court ICWA cases involving their children. This happens for many reasons, including lack of funds, agreement with the state's position, and concern about lay representation instead of representation by counsel at state court proceedings.

Over the years the state has entered into formal agreements with a number of tribes regarding how they will interact in child protection cases, from the earliest reports through the completion of each case. Some tribes have not signed the agreements because they do not address tribal jurisdiction.

The issue of jurisdiction under ICWA bears some discussion. Through ICWA, "Congress created a comprehensive jurisdictional scheme for the resolution of custody disputes involving Indian children. This scheme expanded the role of tribal courts and correspondingly decreased the scope of state court jurisdiction." *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 555 (9th Cir. 1991). For instance, under ICWA, jurisdiction is

exclusive in the tribe when the child custody proceeding involves Indian children who reside on their tribal reservations (exclusive jurisdiction requires proof of Indian country). In the case of Indian children who do not reside or are not domiciled on their tribe's reservation, the state court may exercise jurisdiction (at least) concurrent with the tribal court. However, the state court must refer the dispute to the tribal court unless good cause is shown for the retention of state court jurisdiction.

For tribes in some states, the exclusive and referral jurisdiction provisions of ICWA took effect automatically. However, tribes located within Public Law 280 states, which include Alaska, can invoke such jurisdiction only after petitioning the Secretary of the Interior and having been granted jurisdiction. Public Law 83-280 (commonly referred to as Public Law 280) gave enumerated states concurrent jurisdiction over criminal and civil matters involving Indians, where jurisdiction has previously vested only in federal and tribal courts. The civil portion of this statute is codified at 28 U.S.C. § 1360.

The Alaska Supreme Court and the federal courts are not in agreement on their interpretation and application of Public Law 280 in the ICWA context. The disagreement is over whether, under Public Law 280 and ICWA, the state has exclusive jurisdiction or concurrent jurisdiction over child custody determinations when the tribe has not petitioned the Secretary for reassumption of jurisdiction.

The Alaska Supreme Court has held that, under Public Law 280, tribal courts in Alaska have no child custody jurisdiction (and the state court has exclusive jurisdiction) unless the tribe has petitioned for reassumption of jurisdiction under ICWA. *Matter of F.P.*, 843 P.2d 1214 (Alaska 1992); *In re K.E.*, 744 P.2d 1173 (Alaska 1987); *Native Village of Nenana v. Department of Health and Social Serv.*, 722 P.2d 219 (Alaska 1986). In Alaska, only the Metlakatla Indian Community has petitioned for and been granted such jurisdiction.

The Ninth Circuit has held that under ICWA and Public Law 280, a tribe that has not petitioned for exclusive or referral jurisdiction may exercise concurrent jurisdiction with the state over child custody cases. *Village of Venetie I.R.A. Council*, 944 F.2d at 561-562. The *F.P.* case was decided after, and explicitly declined to follow, the Ninth Circuit's holding in *Village of Venetie* that any Alaska Native entity that proved itself a tribe retained inherent power over child welfare without going through the reassumption process.

Therefore, the state courts and agencies currently cannot, under Alaska law, agree that any Alaska Native tribe other than Metlakatla may assert exclusive jurisdiction under ICWA, 25 U.S.C. § 1911(a). Similarly, the Alaska courts cannot order the transfer of a case from state court to a tribal court, even though courts in other states have been transferring cases to tribal courts in Alaska for years.

Cultural Adoptions

The state currently issues substitute birth certificates when the appropriate parties attest that a cultural, or customary, adoption has taken place. Such adoptions, which are recognized under both federal and state law, are a traditional practice in which, for a variety of reasons, responsibility for a child is shifted from the natural parents to others. Before a substitute birth certificate can be issued, both natural parents must sign a state-provided form identifying the child and the child's tribe and affirming that an adoption has occurred under tribal custom. In addition, the governing body of the child's tribe must certify, in writing, that the adoption has followed tribal custom.

The legal effect of issuing tire substitute birth certificate is unclear, as is the legal effect of a cultural adoption in any given tribe. The state does not recognize tribal court adoptions because of the existing Alaska case law mentioned above, although the federal court has ordered the state to give full faith and credit to the adoption decrees of the Native Village of Venetie to the same extent it gives full faith and credit to

adoption decrees from other jurisdictions. *Native Village of Venetie I.R.A. Council v. State*, Memorandum of Decision, December 23, 1994. The court will be issuing a similar order regarding adoption decrees of the Native Village of Fort Yukon in the Fort Yukon portion of the *Venetie* case.

Marriage, Divorce, and Child Custody

A tribe's authority over the domestic relations of its members may prompt regulation of marriage and divorce and setting of tribal rules for each relationship. As tribes increasingly regulate the relationships of their members, they may perform more marriages and divorces and make more child custody decisions. Since Alaska is a Public Law 280 state, state courts have at least concurrent jurisdiction over family matters. This may lead to jurisdictional questions between the state courts and tribes which will need to be resolved.

The Clean Water Act and Indian Tribes

A question was raised concerning whether Alaska's tribes may be treated as "states" under the Clean Water Act. Under the longstanding federal interpretation of the Act, the answer is "no," except for the Metlakatla Indian Community, because "treatment as a state" is limited to federal Indian reservations.

The Federal Water Pollution Control Act, more commonly known as the Clean Water Act, contains two sections expressly dealing with Native Americans. Section 113, which was part of the 1972 Act, is entitled "Alaska village demonstration projects." It authorizes the EPA to enter into agreements with the State of Alaska to carry out safe water projects and pollution control projects in "Native villages of Alaska." "Village" is defined to mean:

> an incorporated or uncorporated community with a population of ten to six hundred people living within a two-mile radius.

33 U.S.C. § 1263(g).

Section 113 also authorizes federal executive agencies to coordinate with the State of Alaska and "appropriate Native organizations" to develop comprehensive sanitation programs in the Native villages. The term "Native organizations" is defined by reference to the Alaska Native Claims Settlement Act. *Id.* at (e). Thus, the Clean Water Act has long recognized Alaska Natives as such.

In 1987, Congress added section 518 to the Act. 33 U.S.C. § 1377. Entitled "Indian Tribes," section 518 authorizes the EPA to promulgate regulations specifying how the agency will treat tribes in the same manner in which it treats states.[1] The statute specifies those programs in which an Indian tribe can be treated as a state and also lists three criteria that must be met to attain such status. *Id.* at (e). Essentially, a tribe may develop water quality standards and issue effluent permits only if: (1) the tribe has a governing body carrying out substantial governmental duties; (2) the affected water resources are held by or for the tribe or a tribal member "or [are] otherwise within the borders of an Indian reservation"; and (3) the tribe has the technical and legal ability to carry out the mandates of the Clean Water Act.

Section 518 expressly refers to Alaska Natives in several contexts. Some funds are expressly reserved for "Alaska Native Villages as defined in [ANCSA]." 33 U.S.C. § 1377(c). Subsection (g) expressly disclaims any effect section 518 may have on "the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe . . ." Notwithstanding these two references, it is doubtful that section 518 applies to any Alaska Native tribe other than the Metlakatla Indian Community because, as explained below, the section appears

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[1] Similar language is found in the Clean Air Act and the Safe Drinking Water Act, 42 U.S.C. § 7601(d)(2)(B) and 42 U.S.C. § 300j-11(b)(1)(B) respectively.

to be limited to "reservations." *See* subsections (e)(2) and (h)(1).

Pursuant to section 518, EPA has promulgated "treatment as a state" regulations. One set of rules governs tribal establishment of water quality standards. 40 C.F.R. 131, 56 Fed. Reg. 64875-96 (1991). Another pertains to dredge and fill permits (wetlands). 40 C.F.R. parts 232 and 233, 58 Fed. Reg. 8171 (1993). Another pertains to financial grants. 40 C.F.R. parts 35 and 130, 54 Fed. Reg. 14354 - 60 (1989). The most recent publication of which we are aware "specifies how Tribes will be treated in the same manner as States for various provisions of the CWA." 40 C.F.R. 122, 123, 124 and 501, 58 Fed. Reg. 67966 (1993).

A reading of the most recent rule shows EPA only treats tribes as states on matters related to resources within a reservation[2]. Thus, because Metlakatla is the only reservation tribe in Alaska, the decision to no longer contest the tribal status of Alaska Native villages on the 1993 and 1995 lists of federally recognized tribes will have no impact under the Clean Water Act "treatment as a state" provisions.

Sovereign Immunity

One of the attributes tribes enjoy is sovereign immunity. *See, e.g., Native Village of Eyak v. GC Contractors*, 658 P.2d at 758. This immunity extends to corporations created by the tribe, such as those chartered under the Indian Reorganization Act. The most common Native corporations in the state currently are ANCSA corporations, which do not enjoy sovereign immunity because they are state-chartered corporations.

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[2] "EPA believes that it was the intent of Congress to limit Tribes to obtaining the status of Treatment in the Same Manner as a State for lands within the reservation. . . Tribes are limited to obtaining Treatment in the Same Manner as a State status for only water resources within the borders of the reservation over which they possess authority. . . " 58 Fed. Reg. 67970.

Sovereign immunity bars suits against tribes. It also bars cross-claims and counterclaims. *United States v. U. S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940). It does not bar suits against individual tribal officials. Congress can waive the tribes' sovereign immunity, but the waiver must be clearly expressed and strictly construed. *See Santa Clara Pueblo v, Martinez*, 436 U.S. 49 (1978); *Turner v. U.S.*, 248 U.S. 354 (1919).

The extent to which and manner in which tribes can waive their sovereign immunity is less clear. The Alaska Supreme Court has held that tribes can waive their sovereign immunity by contract. *Nenana Fuel v. Native Village of Venetie*, 834 P.2d at 1233; *Native Village of Eyak v. GC Contractors*, 658 P.2d at 759. However, federal law requires that to waive immunity by contract in matters relating to trust property, tribes must receive Secretarial or Congressional consent.

With respect to environmental laws, the federal courts generally hold that Congress has abrogated tribal sovereign immunity when the United States seeks to enforce federal environmental laws against tribes. Therefore, a tribe operating a business would not be immune from federal environmental standards and requirement. However, state enforcement of its standards and requirements against such an entity may be problematic. A few Native groups in Alaska have claimed" sovereign immunity in response to efforts by ADEC to enforce the state's "little superfund law," AS 46.03. This could be an area of dispute with tribes in the future.

Alcohol Control

Under state law, both Native and non-Native residents of rural villages have been delegated significant authority to control the use of alcohol. AS 04.11.490--04.11.506. In addition to adopting restrictions on alcoholic beverages, "local governing bodies" may protest the issuance, transfer, relocation, or renewal of liquor licenses. Currently, the Alcoholic Beverage Control Board regulates the licensing of establishments that manufacture, sell, of otherwise deal in

alcoholic beverages, including those located within Native villages.

If a particular tribe were recognized as having control over an area of Indian country, that tribe could adopt alcohol ordinances for enforcement in its tribal courts. In addition, the tribe could choose to adopt ordinances regulating the sale, importation, or possession of alcoholic beverages within its Indian country through a federal process instead of the state process, thereby making the ordinance enforceable by a federal court. See 18 U.S.C. § 116. Otherwise, federal and state laws concurrently govern the control and regulation of alcoholic beverages in Indian country. *Rice v. Rehner*, 463 U.S. 713 (1983),

Criminal Law Enforcement

Tribal recognition alone does not confer tribal jurisdiction over any criminal act. The criminal jurisdiction of a tribe is limited to the territory it controls. Without territorial jurisdiction, *i.e.*, Indian country, a tribe has no criminal jurisdiction.

A tribe can exercise criminal jurisdiction over its members within Indian country. Where Indian country exists, tribes have the power to make their own criminal laws and enforce them in tribal counts unless Congress limits that power. *U.S. v. Wheeler*, 435 U.S. 313 (1978). The Indian Civil Rights Act, 25 U.S.C. § 1302, limits how tribes exercise their powers of self-government. Tribes cannot exercise criminal jurisdiction over non-members unless Congress expressly grants that power. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191. (1978).

Generally states have no criminal jurisdiction over tribal members within Indian country. *Rice v. Olson*, 324 U.S. 786, 789 (1945); *Worcester v. Georgia*, 31 U.S.(6 Pet.) 575 (1832). However, in 1958 Congress gave the State of Alaska "jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . ." 18 U.S.C. § 1162, Pub. L. 83-280. As a Public Law 280 state, Alaska has jurisdiction

over all crimes committed in Indian country. Although 18 U.S.C. § 1162 refers to the state having "exclusive jurisdiction" within Indian country, courts have recognized concurrent tribal jurisdiction over minor crimes.

Indian Gaming

Tribal recognition does not impact Indian gaming in Alaska. The federal Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-21 (IGRA), permits recognized Indian tribes to conduct Class III gaming on "Indian land" if such gaming is otherwise legal in the state, upon negotiation of a gaming compact that is approved by the federal Indian Gaming Commission. Class III gaming consists of all casino games except bingo, pull-tabs, and traditional social games of chance. Without Indian land, a tribe does not have the necessary territorial jurisdiction to conduct gaming. In addition, under current state law casino gaming is illegal and thus not allowed to Natives or non--Natives in Alaska.

Fish and Game Management

State recognition of Alaska tribes does not affect fish and game management. Indian rights to manage fish and game originate from three sources: (1) reservation status of land; (2) off-reservation treaty rights; and (3) federal preemption of state regulation. Only one reservation exists in Alaska (Metlakatla), and no treaties exist between the federal government and Alaska Natives. Therefore, any Native rights to manage fish and game can only be based on federal statutes preempting state control. In Alaska, ANILCA grants rural residents, both Native and non-Native, a priority for the taking of fish and wildlife on public lands for subsistence uses. Tribal recognition does not impact this individual federal right.

Alaska Native Villages Defined as Tribes for Specific Federal Purposes

Although blanket federal recognition of Alaska Native villages as tribes did not occur until the October 21, 1993, listing, Congress has repeatedly chosen to treat Alaska Native villages as tribes for specific purposes.

The following statutes are examples of instances in which Alaska Native villages have been included in the statutory definition of Indian tribes or where Native villages have been included along with tribes in definitions of units of government affected by statutes (citations are primarily to the definition sections involved:

5 U.S.C. § 3371. Provisions for personnel assignments to and from states.

15 U.S.C. § 637. Aid to small businesses.

16 U.S.C. § 470w. Assistance in the conservation of historic sites, buildings, objects, and antiquities,

16 U.S.C. § 470bb. Programs for archaeological resources protection.

20 U.S.C. § 3232. Assistance in bilingual education programs.

20 U.S.C. § 4402. Assistance in development of American Indian, Alaska Native, and Native Hawaiian culture and art.

23 U.S.C. § 101. Assistance provided for public roads under the program for federal aid for highways.

25 U.S.C. § 472a. Included as a "tribal organization" in applying Indian preference laws.

25 U.S.C. 1452. The Indian Financing Act of 1974.

25 U.S.C. § 1603. The Indian Health Care Amendments of 1980.

25 U.S.C. § 1622. Eligibility of tribal organizations for health care grants and contracts.

25 U.S.C. § 1903. The Indian Child Welfare Act.

25 USC. §§ 2011 and 2019. Establishing a new national Indian education system.

25 U.S.C. § 2401. Indian alcohol and substance abuse prevention and treatment.

26 U.S.C. § 4225. Exemption of articles manufactured or produced by Indians.

29 U.S.C. § 706. Provision of vocational rehabilitation and other rehabilitation services.

29 U.S.C. § 1671. Employment and training programs for Native Americans and migrant and seasonal farm workers.

31 U.S.C. § 7501. The single audit requirement for state and local governments.

42 U.S.C. § 628. HHS payments to Indian tribal organizations for child welfare services.

42 U.S.C. § 1471. USDA financial assistance for farm housing.

42 U.S.C. § 2991b. HHS financial assistance for Native American projects under the HHS Native American Program, administered by ANA.

42 U.S.C. § 2992c. RHS program for Native Americans.

42 U.S.C. § 3002. HHS programs for older Americans.

42 U.S.C. § 5061. HHS programs for administration and coordination of domestic volunteer services.

42 U.S.C. § 5122. Provision of federal assistance to other levels of government for disaster relief.

42 U.S.C. §§ 5302 and 5316. Assistance in providing public facilities under the Housing and Urban Development Act of 1968.

42 U.S.C. § 6707. Grants four public works projects.

42 U.S.C. § 6723. Assistance under anti-recession provisions for public works employment.

42 U.S.C. § 5903. Assistance in the planning and administration of solid waste disposal.

42 U.S.C. § 8803. Assistance in the development of biomass energy and alcohol fuels.

42 U.S.C. § 9601. Special programs and assistance relating to hazardous substance releases, liability and compensation.

42 U.S.C. § 10101. Assistance in handling nuclear waste.

42 U.S.C. § 11472. Set-asides to assist in education, training, and community services for the homeless.

Section 4, Alaska Statehood Act and Article XII, Section 12, Alaska Constitution

A member of the public who testified at the hearing inquired about the relationship between section 4 of the Statehood Act and article XII, section 12 of the Alaska Constitution, and the tribal status and Indian country issues.

Both section 4 of the Alaska Statehood Act (Pub. L. 85-508, 72 Stat. 339 as amended) and article XII, section 12 of the Constitution of Alaska provide that the state and its people "forever disclaim all right and title to any lands or other property" owned or subject to disposition by the United States, and to any lands or other property, including fishing rights, the right or title to which may be held by or in trust for any Indians, Eskimos, or Aleuts. Both sections further provide that all such property shall be subject to the absolute control, jurisdiction, and right of disposal of the United States except as Congress otherwise provides.

These provisions have no relevance in the debate over tribal status; they do not address the issue. The Statehood Act expressly states that it shall not be construed to "recognize, deny, enlarge, impair, or otherwise affect" claims against the United States or to establish the validity or invalidity of any such claim. Tribes are not mentioned in either provision, and these sections have not been relied on by tribal advocates in the cases now in the federal courts. These provisions are cited as justification for permitting Native selections of state-selected lands under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, and exempting undeveloped ANCSA land from taxation, but beyond that, they are not germane to the current debates over tribal status and Indian country.

Budgetary Impacts of Tribal Status Litigation

Concern was expressed by a legislator that the Department of Law may have made representations about litigating the tribal status issue in order to secure funding for litigation.

The Department of Law made no commitment in any budget document to litigate the tribal status issue. The department has in the past sought CIP funding to litigate other issues that concern or involve the interests of Alaska Natives. These include the Endangered Species Act cases, the fishing treaty cases, the submerged lands cases, and various ANILCA challenges, most notably *Katie John v. United States* and *Totemoff v. State*, This litigation continues. *See, e.g.*, CP Descriptions for FY 1995 and FY 1996.

CONCLUSION

Some participants in the December 4, 1995, hearing[3] characterized the decision to no longer contest the tribal status

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[3] During the hearing a legislator requested a copy of the report entitled *Legal Status of the Alaska Natives* by Robert L. Price (July 30, 1982; 1983 and 1989 supplements). Please let my office know if you would like a copy.

of Alaska Native villages as a wholesale reversal of prior executive and legislative branch policies and an abdication of responsibility. This view does not reflect the true complexity of the state's dealings with tribes.

Successive state administrations have recognized the need to work with tribal entities in various contexts. For example, as discussed earlier, since the early 1980's the state has entered into memoranda of agreement with tribes implementation of the Indian Child Welfare Act. Governor Cowper's Administrative Order No. 123 acknowledged tile existence of tribes in Alaska. Although Governor Hickel later revoked Administrative Order 123 and declared that the state "opposes expansion of tribal governmental powers and the creation of `Indian Country' in Alaska," his administration did not oppose tribal status in a wholesale fashion. Thus, my predecessor chose not to contest the tribal status of the Kluti Kaah Native Village of Copper Center in litigation over the tribe's right to impose a tax on the TransAlaska Pipeline System.

Since 1985 the legislature itself has authorized state aid to Alaska Native village councils to the extent they waive immunity from suit for claims arising out of activities related to the payment. AS 29.60.140.

Finally, while people may disagree with the wisdom: of this policy change, there should be no doubt that the Governor has the authority to adopt and implement the tribal status policy for his administration, just as his predecessors have done. As attorney general, I will continue to provide the best legal advice available to the state's chief executive and to support his policy choices to the extent they are consistent with the law. In this instance, I have no reservation in doing so.

Very truly yours,

Bruce M. Botelho
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January 21, 2000

Theodore W. Popely
Counsel for the Senate and House Majority
Alaska State Legislature State Capitol, Room 116
Juneau, Alaska 99801

Re: *Baker v. John*

Petition for Certiorari No. 99-973

Dear Mr. Popely:

Mr. John Baker, the petitioner in the above-captioned action, consents to the Honorable Drue Pearce, president of the Alaska Senate, and the Honorable Brian Porter, speaker of the Alaska House of Representatives, filing a brief in the above-captioned action as amici curiae in support of the petitioner. Mr. Baker also supports President Pearce and Speaker Porter's motion to file their brief out of time.

Sincerely,

Donald Craig Mitchell
Counsel of Record for Petitioner John Baker

cc: Andrew Harrington Counsel of Record for Respondent